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No. _____

IN THE

Supreme Court of the United States

SPRING TERM, 1981

JOHN E. BOYD

Petitioner,

v.

WESTERN ELECTRIC, a corporation, JOHN D. DEBUTTS and THEODORE G. CLARK,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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As to form:

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June, 1981

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit, erred in refusing to rescind the voluntary, "Special Early Retirement Contract" (Hereinafter the "SERP" contract) between the petitioner and Western Electric (Hereinafter "Western"), due to duress, unconscionability, greater strength and fraud by Western and anticipatory repudiation by the petitioner, and rule the petitioner be reinstated in his employment?

2. Whether the petitioner, having had his action, under the Age Discrimination in Employment Act of 1967 (Hereinafter "ADEA"), dismissed in an Opinion dated Aug. 12, 1976, for failing formally to notify, the New Jersey Dept. of Civil Rights, of intent to sue, within 180 days of the violation, per N.J.S.A. 10: 5-18, can have his claim reinstated retroactively, now that the 180 day time of notice regulation, is no longer

a bar to suit?

3. Whether the Court of Appeals and the District Court, should be overruled because, conflicts exist between different judges in the New Jersey district court, on the questions of (A) whether there was tortious interference with the petitioner's right to practice his profession? And (B) whether there was an implied contract of employment with Western? And (C) whether there was interference with the petitioner's position of advantage?

4. Whether the trial court showed prejudice against the petitioner, who was pro se, and arbitrarily ruled against the petitioner on several occasions?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Rules Involved	3
Statement of the Case	5
Reasons for Granting the Writ-	16
1. This case presents consitutional and legal issues, relating to whether employees who are coerced by large corporations, to sign early retirement contracts, can have the said contracts rescinded by the court?	16
2. This case presents the important issue, of whether the petitioner should lose his claim under the ADEA, which is humanitarian legislation, over a time for notice regulation, N.J.S.A. 10: 5-18, which no longer bars suit today?.....	26

Page

3. The decision of the district court conflicts with its rationale of its prior decision in Kyriazi v. Western Electric et al., 461 F. Supp 894 at 950 (1978), on the important issue of whether there was tortious interference with the petitioner's contract of employment, his right to practice his profession and with his position of advantage with respect to potential employment 32

4. This case should be reviewed because of the issues of the difficulty of retaining an attorney to prosecute Western and the district court's bias against the resulting pro se status of the petitioner... 41

Conclusions 46

Appendix-

(i) Opinion of the District Court in Case 75-2042, Aug. 12, 1976..... A-1

(ii) Memorandum Opinion of the District

Page

Court in 76-2427 and 76-2470 on Feb. 14, 1979 (79-1753 & 79-1754 on appeal)..... A-23

(iii) Order by the District Court in 76-2427 (79-1753 on appeal), Feb. 28, 1979.. A-44

(iv) Order of the District Court in 76-2470 (79-1754 on appeal), Feb. 28, 1979.. A-47

(v) Judgment Order of the Court of Appeals for the Third Circuit in 79-1753 and 79-1754 on Jan. 7, 1981 ..... A-50

(vi) Excerpts from Kyriazi v. Western Electric Co, et al., 461 F. Supp. at 950 (1978)..... A-52

(vii) Excerpts from the "SERP" contract Aug. 10, 1973..... A-53

TABLE OF AUTHORITIES

Cases:

Boyd v. Western Electric Co., et al., 562 F.2d 41 (3d Cir. 1977), not reported... 14

Brennan v. United Hatters of North America, Local No.17, 73 N.J.L. 729, 65A. 165 Ct. of Errors and Ap's 1906)..... 38,39

Page

Goger v. Porter Co., Inc., 492 F.2d 13 (3d Cir. 1974) 26 -29,30

Holiday v. Ketchum, McLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978).. 26 -31

Kyriazi v. Western Electric Co., et al., 461 F. Supp. 894 (D.N.J. 1978).. iv 16,17,20,21 32-39,41,42

Kyriazi v. Western Electric Co., et al., 476 F. Supp. 335 (D.N.J. 1979)..... 38

Oscar Mayer & Co., v. Evans, 441 U.S. 750 (1979)..... 27

Raffles v. Wickelhaus, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (1864) 18

Sims v. Order of United Travellers, 343 F. Supp. 112 (D. Mass. 1972)..... 22

Constitution of the United States:

Art. 1, sec. 10, cl. 1 3,19,20,29

Fifth Amendment, Due Process Clause..3,22,23

Fourteenth Amendment, Equal Protection Clause..... 21,23

Statutes and Regulations:

29 U.S.C. sec. 621 et seq. (Age Discrimination in Employment Act-ADEA) i 4,10-13,23,24 26-31,39,40

28 U.S.C. §1254(1)..... 2

N.J.S.A. 10: 5-18..... i,iii,4,11,13,26

Fed. R. of Civ. P. 15 (a) 5,44

Miscellaneous:

1B MOORE'S FEDERAL PRACTICE, para. 0.402, p. 171 30

Freedom of Information Act (FOIA).. 40,44

Federal Communications Commission (F.C.C.)..... 7,12

No. _____

In The

SUPREME COURT OF THE UNITED STATES

Spring Term, 1981

JOHN E. BOYD,
Petitioner,

v.

WESTERN ELECTRIC, a corporation,
JOHN D. DeBUTTS and THEODORE G. CLARK,
Defendants,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner John E. Boyd prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on January 7, 1981.

OPINIONS BELOW

The Court of Appeals did not issue an opinion; but affirmed the summary judgment of the District Court. The judgment order of the Court of Appeals is in the appendix

at page A-50. The Opinion of the District Court, dated August 12, 1976, in 75-2042 was unpublished and is at A-1 . The Opinion of the District Court in 76-2427 and 76-2470 was unpublished and is at A-23; and the judgment orders are at A-44 and A-47

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The jurisdiction of the District Courts was founded on diversity of citizenship and the amount involved was over $10,000.

This petition for a writ of certiorari was filed on March 4, 1981, which is within ninety days of the judgment order of the Court of Appeals on January 7, 1981. The petition was returned to make corrections to conform to the rules of June 30, 1980 of the Supreme Court of the United States. The corrected petition is submitted herewith.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions:

U. S. CONST. art. 1, sec. 10, cl. 1: "no State shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The applicable part of the Due Process Clause of U. S. CONST. amend. V states: "No person shall be...deprived of life, liberty, or property, without due process of law;..."

The applicable part of the Equal Protection Clause of U.S CONST. amend. XIV, sec. 1, states: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

The Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA); §623 (a) says: "It shall be unlawful for an employer- (1) to ...refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;....."

N.J.S.A. 10: 5-18, Rules of Practice; limitation, says, "Any complaint filed

pursuant to this section must be filed within 180 days after the alleged act of discrimination."

Regulations:

Fed. R. of Civ. P. 15 (a) says, "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served...."

STATEMENT OF THE CASE

The petitioner was hired in 1947, by Western, at its Kearny, N. J. works, which employed 25,000 people, making telephone equipment. The petitioner has a B.A.Sc. in chemical engineering and 10 year's prior experience with a DuPont subsidiary and as a navigator in the Canadian Air Force. He became a registered professional engineer in N. J. No. 12,149; and obtained a master's degree in industrial and management engineering and a master's degree in business administration (M.B.A.) from N.Y.U.

The petitioner worked for Western as an industrial, cost, product, military product liaison and quality engineer. Much of the petitioner's work concerned improving the efficiency of groups of workers on piecework and the quality of their output and issuing reports. Works efficiency improved from 70% in 1947 to over 100%. The petitioner believed in higher profits and wages from improving piecework efficiency.

However, a split or policy disagreement developed in the management, with some managers believing efficiency should be improved and others feeling it should not be increased further. The petitioner began to receive intimations from the supervision that his efficiency reports were considered to be critical of the management. Later, he found he had secretly been removed from the list of those promotable into management and increases in salary stopped completely. When the petitioner questioned these

changed relationships the atmosphere became threatening.

In 1966 the Federal Communications Commission (F.C.C.) began an investigation into Western and the American Telephone and Telegraph Co. (A. T. & T. Co.) and invited testimony. The petitioner believed testifying would be in the public interest and also mistakenly believed that it would serve as a protection to his position. Therefore the petitioner testified stating that Western could have saved $500 million by improved administration of its time-standards for its pieceworkers at Western's Kearny, N. J. works.

On his return from so testifying the petitioner's supervisor, B. J. Haycock told him Western considered him a traitor for testifying.

The professional engineer's union, United Federation of Engineers (UFE), had just been voted in, in 1968 and the

petitioner received three raises in a row, while UFE was certified. But, in 1971, UFE was voted out by a margin of five votes and the petitioner's increases in salary stopped immediately.

On August 9, 1973, when the petitioner was 59, B. Haycock and L. Newill, a fourth level supervisor, told the petitioner to sign a contract for the voluntary, Special Early Retirement Contract (Known as the "SERP" contract), by next day, August 10, 1973, under the duress of possible dismissal and loss of pension benefits if he did not sign. The petitioner was working on quality control development at this time.

The petitioner was startled by this turn of events, but believed this was coercion designed by Western to scare him into signing quickly. The petitioner also believed the purpose of said supervisors was to conceal mismanagement. In the short time

available he telephoned attorneys who advised the best thing to do was to mark words indicating "duress" on the said "SERP" form of contract, since they believed such a notation would invalidate the SERP contract. They advised signing the contract and suing for rescission on the theory that such a contract would easily be rescinded in court with back pay and damages.

The petitioner also telephoned an official in the Dept. of Labor in Newark, N.J., who suggested that the petitioner mark "duress" on the SERP contract form and sign and then "blast" the affair to the newspapers.

Against his innermost feelings the petitioner who had no legal experience, marked words indicating "duress" on the said SERP contract form and signed on Aug. 10, 1973 (See A-53). Retirement was to take place on Dec. 31, 1973. However, contrary to the opinion of counsel, petitioner has not been able to get the district court to rescind

the said SERP contract.

During this period, August 10, 1973 to December 31, 1973, petitioner was in telephone contact with the Dept. of Labor in Newark, N.J., notifying them of his intent to file suit against Western under the ADEA if Western did in fact, force him to retire on Dec. 31, 1973.

For example, petitioner notified Mr. Thomas Davine in the Dept. of Labor, Newark, N. J. of intent to sue, on Oct. 24, 1973. Mr. Davine said they were held back by the legal department. He also notified Mr. S. Friedman in the Dept. of Labor in Newark on Dec. 3, 1973 by telephone of intent to sue under the ADEA. Mr. Friedman said they had a large file on the petitioner and were willing to go in to contact Western and discuss the petitioner's claim if they could use the petitioner's name but really could do nothing. Petitioner again notified Mr. Friedman by telephone of intent to sue

under ADEA on Dec. 10, 1973. Mr. Friedman said the companies demanded absolute loyalty. There was the question of retaliation by Western if petitioner filed his complaint while still employed by Western.

Therefore, it was decided not to start proceeding against Western until after Dec. 31, 1973 in case Western should change its mind and decide not to force petitioner into retirement under the SERP contract. Western had posted no notices of the ADEA in the building where petitioner worked although this is required by the ADEA. Petitioner was never advised of the mandatory nature of the 180 day filing period to notify the N.J. Dept. of Civil Rights of intent to sue, per N.J. S.A. 5: 10-18.

There were other positions available to the petitioner in the Telephone System. In November, 1973, the A. T. & T, Co., parent of Western, offered petitioner a position in marketing at 22 Cortlandt St., N.Y.C.

if Western would permit him to transfer; but Mr. Cuthbertson, works manager of Western's Kearny Works refused permission, causing petitioner to lose this advantageous position. He was forced to retire under the SERP contract on Dec. 31, 1973.

Petitioner was advised by an attorney that he had two years in which to file suit. Petitioner began preparing his suit in July, 1975. Up to this time petitioner consulted with numerous attorneys but none wished to represent him. Petitioner filed suit No. 75-2042 against Western in the district court on Dec. 1, 1975.

The district court action alleged tortious interference with petitioner's contract under a conspiracy to conceal mismanagement and violation of the ADEA; and asked the court to rescind the SERP contract and included other counts that can be grouped under fraud. He also claimed retaliation for testifying before the F.C.C. and for

supporting the professional engineers' union, UFE.

After a hearing on 75-2042 the district court dismissed the ADEA claim in an Opinion dated Aug. 12, 1976 (A-1), for failing to notify the State Dept. of Civil Rights of intent to sue, within 180 days of Dec. 31, 1973 pursuant to N.J.S.A. 10: 5-18 (A-20).

The court dismissed the remaining claims in the same Opinion (A- 1) for lack of a federal question and lack of diversity or pendant jurisdiction. The court incorrectly said the petitioner who resides in N.J. was not diverse with respect to Western with headquarters and place of incorporation in N.Y.C. The court refused the petitioner's motion to change defendants to establish diversity of citizenship* Petitioner's claim of retaliation by Western for supporting the union UFE, was dismissed for failure to notify the NLRB within six

*This was an error by the court since petitioner was diverse with respect to WESTERN.

months. Petitioner was told to file in state court (A-19). Petitioner appealed to the Third Circuit as docket No. 76-2488. The Court of Appeals affirmed the district court on Sept. 9, 1977 in Boyd v. Western Electric et al., 562 F.2d 41 (3d Cir. 1977-unpublished). While his state actions were pending he filed two similar suits in the federal district court with its longer statute of limitations on Dec. 30, 1976. These suits were 76-2427 asking that the SERP contract be rescinded and 76-2470 pleading the remaining counts of 75-2042.

The parties proceeded into discovery on 76-2427 in April, 1978 and petitioner also proceeded to amend 76-2470 according to the directions of the district court. During proceedings Judge Lacey admonished him frequently to get an attorney. Petitioner explained to the court the difficulty in obtaining competent representation who would accept such an enormous suit against Western. He attempted many times to hire an experienced attorney but was unsuccessful.

The court dismissed both cases on Feb. 14, 1979 on Western's motion for summary judgment. Petitioner filed timely notices of appeal to the Court of Appeals for the Third Circuit. These appeals were docketed as 79-1753 and 79-1754 the final briefs being filed on Dec. 5, 1979.

The court of Appeals dismissed the appeals on Jan. 7, 1981 (A-50) and petitioner hereby petitions for review of the decisions.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS CONSTITUTIONAL AND LEGAL ISSUES RELATING TO WHETHER EMPLOYEES WHO ARE COERCED BY LARGE CORPORATIONS TO SIGN EARLY RETIREMENT CONTRACTS, CAN HAVE THE CONTRACTS RESCINDED BY THE COURTS?

The petitioner argues that he had an implied contract of employment with Western. For example Judge Stern in the similar case Kyriazi v. Western Electric Co., et al., 461 F. Supp. at 950 (1978) said, referring to the "state" claims of Kyriazi, that Kyriazi who was in the same job classification as petitioner, had in fact, "(p)roved a pattern of conduct on the part of her... supervisors which amounts to a tortious interference with her employment contract with Western." (Emphasis supplied). Kyriazi, id., at 950. But Judge Lacey in the same court, ruled in petitioner's case that he had no such contract of employment

although petitioner pleaded that he had such a contract (A - 38, 1.13-17; A - 39, 1. 10-14) (Reference to Kyriazi, id., refer only to her "state" claims, as distinct from her "sex bias" claims under EEOC).

This issue of whether petitioner had an implied contract of employment concerns this reason and reason Three. If Kyriazi with six year's service had a contract of employment with Western, petitioner with Twenty-six year's must have a contract too.

Petitioner argues in fact, that he had three contracts with Western, (A) an implied contract of employment (B) "SERP" Early Retirement Contract and (C) Pension Contract.

There is no disagreement as to facts. Therefore, the issue for the Court to decide is whether contract law applies to these contracts especially the "SERP" contract. The Court should rescind the

the SERP contract and reinstate petitioner with back pay and damages as was Kyriazi.

These facts as to the SERP contract are clear: (A) Duress was applied by Western the stronger party (B) The terms and conditions of signing were unconscionable in that at one day's notice the said contract removed the petitioner's livelihood and opportunity to practice his profession in return for a pittance of a pension in times of roaring inflation (C) There was no required meeting of minds as necessary for a legal contract since the petitioner wrote words signifying duress right on the SERP contract form (A-53). Raffles v. Wickelhaus, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (1864), (D) There was anticipatory repudiation by petitioner shown by words signifying duress, written on the SERP contract.

Therefore the SERP contract was invalid and the Court should rescind said contract

and return the parties to their original positions. The issue then becomes the calculations of damages under the pension.

It should be noted the petitioner's pension is based on his highest five year's salary which normally is the last five years of employment. In addition as explained under question Three the petitioner if given permission to accept the job offered by the A. T. & T. Co. would have participated in the subsequent accelerated increase in salaries which approximately doubled in the next few years. Also his pension and social security receipts would have increased enormously.

There are constitutional issues raised by the above refusal of the district court to rescind the SERP contract. The court's refusal violates the Contract Clause of the Constitution of the United States, art. 1, sec. 10, cl. 1, which says, "no State shall...pass any bill of attainder,

ex post facto Law, or Law impairing the Obligation of Contracts..."

It is clear that here the district court, represents state action and is refusing to apply common law of contracts to rescind the SERP contract. Therefore, the district court is violating the Contract Clause of the Constitution. The district court cited no cases in support of its refusal that applied to contracts. The court ignored the petitioner's contractual relationships such as the SERP contract and the contract of employment. This is an important issue affecting employees and corporate employers and should be reviewed and clarified.

The correct argument and decision is discussed in more detail in reason Three on conflicts among the judges in the district court on these issues. Kyriazi, id., at 950. Kyriazi without a SERP contract or rights under the ADEA, was reinstated in her position. Judge Stern based his decision on

Kyriazi's having suffered "(t)ortious interference with her employment contract with Western." (Emphasis added) Kyriazi id., at 950. The items of tortious interference suffered by Kyriazi were similar to those suffered by the petitioner, such as severance from Western, no raises and the refusal to refer to petitioner, meaningful assignments.

Moreover this case should be reviewed because the refusal to rescind the SERP contract, violates the Equal Protection Clause of the U.S. CONST. AMEND. XIV, which says, "(n)or shall any State deprive any person of property...without due process of Law; nor deny to any person... the equal protection of the laws." (Emphasis supplied), The district court has violated this equal protection clause, by holding that petitioner's status as an employee, deprives him of his right to use common law to protect himself from burden of having to adhere to the provisions of the

SERP contract. The right to rescind this invalid contract concerns employer-employee relationships for senior employees coerced into signing early retirement contracts.

The fifth amendment to the Constitution also is involved. Amendment V says, "(N)o person shall be...deprived of life, liberty, or property, without due process of law;,,,," (Emphasis supplied). As stated above petitioner has a Western Pension Contract. This contract's value escalates rapidly in the last five years of employment and is a property right.

Moreover, the Pension Contract includes life insurance which is also a property right, as held by the court in Sims v.Order of Commercial Travellers, "A contract for the purchase of life insurance is a property right...." (Emphasis supplied) Sims v. Order of Commercial Travellers, 343 F. Supp. 112 (1972-Mass).

Therefore altho the Pension Contract does not guarantee employment, taken in conjunction with the SERP contract under coercion and an implied contract of employment, it is clear the district court deprived petitioner of property rights without due process of law. Amendment V applies here through the enabling clause of amendment XIV.

The district court(Judge Lacey) erred in labelling early retirement under the SERP contract as an effective discharge (A-38,l. 1-3) instead of correctly designating early retirement as a "Pension Contract". Thus the contract issue was ignored by the court with the result that petitioner was not allowed to rescind the invalid SERP contract. The court's reasoning is incorrect because petitioner had several legal recourses open to him had Western told him they were going to dismiss him. e.g. he immediately would have contacted the Dept. of Labor and the N.J. Dept. of Civil Rights under ADEA. First the N.J. Dept. of Civil Rights would have attempted mediation and if that

failed the Dept. of Labor also would have joined in mediation or conciliation. The N.J. Dept. of Civil Rights could have sued on petitioner's behalf and the Dept. of Labor also could have taken legal action for him. In addition petitioner had two years to sue under the ADEA on his own.

There was also available a complaint to the National Labor Relations Board (NLRB), alleging that he was being discriminated against for activities in the professional engineers' union (UFE). This union of which he was a member was voted out in 1971 but the petitioner was one of four in his department of twenty-one eligibles who continued to pay dues. Petitioner was the third of these four dues-paying members who was forced out of Western.

Therefore, Western faced a series of potent legal actions if it dismissed the

petitioner. Consequently, the district court's reasoning that the petitioner could have been easily dismissed, was untenable. Whether the petitioner could have been dismissed is not an issue before the Court.

In the unlikely event that Western could have or would have dismissed him, the court's position is still untenable, because petitioner was not in fact dismissed.

In conclusion, these issues discussed above, are important as being representative of the problems of older employees in similar situation who have been coerced by their large corporate employers into signing early retirement contracts.

2. THIS CASE PRESENTS THE IMPORTANT ISSUE OF WHETHER THE PETITIONER SHOULD LOSE HIS CLAIM UNDER THE ADEA, WHICH IS HUMANITARIAN LEGISLATION, OVER A "TIME FOR NOTICE" REGULATION N.J.S.A. 10: 5-18 WHICH NO LONGER BARS SUIT TODAY.

This claim under the ADEA was dismissed in an Opinion dated Aug. 12, 1976 in case 75-2042 in district court by Judge Meanor (A-20) because petitioner had failed to notify the State Dept. of Civil Rights of intent to sue within 180 days of the act of discrimination under N.J.S.A. 10: 5-18. In support the court cited Goger v. Porter Co., Inc., 492 F 2d 13 (3d Cir. 1974) which mandated filing within the 180 day time-period. Otherwise the claimant loses his rights under the ADEA.

Not only was Goger, id., a split decision but it now has been overruled by Holiday v. Ketchum, McLeod & Grove, Inc.,

584 F.2d 1221 (3d Cir. 1978) and also by Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). The Opinion in Holiday makes it clear that failure to notify the state within 180 days does not bar federal action under the ADEA. The Opinion in Holiday, id., concludes, "(H)aving reconsidered this issue, we have arrived at a different answer. Thus we overrule Goger and hold that resort to state age discrimination remedies is not a precondition to maintaining a federal suit for age discrimination." Holiday v. Ketchum, McLeod & Grove, Inc., 584 F.2d 1221 (As amended Aug. 7, 1978) at 1222. This Opinion also states "(W)e find it significant that the Secretary has urged that the ADEA affords complainants a choice of forum. Holiday, id., at 1228. This Opinion continues, "On balance...we do not hesitate to conclude that the ADEA's purposes would be frustrated rather than fulfilled if we were to perpetuate a procedural require-

ment which...would prevent an otherwise meritorious age discrimination claim from being considered." Holiday, id., at 1230. Therefore the basis on which petitioner's claim was dismissed, is no longer an impediment to suit under the ADEA.

The Court of Appeals in Holiday, id., p. 1230 ameliorated the harsh effects of Goger v. H. K. Porter Co., Inc. 492 F.2d 13 (3d Cir. 1974) in each actual case as follows: "In this circuit alone, we have had three examples of claimants who had not fulfilled...'jurisdictional' requirements of resorting to prior state proceedings (180 day limit on notice to N.J. Dept. of Civil Rights). In each instance... we recognized an equitable 'outlet which avoided the harsh result of dismissing the complaint...!" Holiday id., at 1230. However, neither Judge Meanor nor Judge Lacey devised any such "equitable outlet" for the petitioner's case. Therefore, in view of the history of the ADEA as shown

above, it is proper that his ADEA claim should be allowed or at least reinstated.

It also appears constitutionally improper for this ADEA claim to have been dismissed because Goger v. Porter, 492 F.2d 13 (3d Cir. Jan. 31, 1974) was decided on Jan. 31, 1974, approximately 6 months after petitioner's cause of action if taken as the day of signing the contract on Aug. 10, 1973 or 1 month after he retired on Dec. 31, 1973. The application of Goger, id., to Petitioner, was in effect, the use of an "ex post facto' Law in violation of art. 1, sec. 10, cl. 1 of the Constitution.

Moreover, it is clear that if Goger, id., can be retroactively applied to dismiss petitioner's suit, then it is also proper for the court to apply Holiday v. Ketchum, McLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) retroactively to reinstate his suit. This is especially true since this ADEA claim has been continuously under appeal.

The large corporations were having a "field day" with Goger v. Porter, 492 F.2d 13 (3d Cir. 1974).

Retroactive application of the decision in Holiday v. Ketchum, McLeod & Grove, Inc., 584 F. 2d 1221 (3d Cir. 1978) would balance the scales of justice in this case. For example Moore's Federal Practice states, the "(g)eneral rule is... that judicial precedents have retroactive as well as prospective effect. "MOORE'S FEDERAL PRACTICE, para. 0.402, p. 171, footnote 1.

Moreover this ADEA claim requires review because it is just one example of numerous cases of employees forcibly retired from Western and seeking reinstatement under the ADEA. Western's actions are adversely affecting the public financial interest by forcing people on to the Social Security rolls at an earlier age, thereby, reducing their income and

increasing the expenses of the Social Security system. Western also is reducing the lifetime productivity of its employees by forcing them to retire early and this is detrimental to the public interest.

In addition, contrary to the public interest, Western is eroding the United States treasury by receiving income tax benefits for the standard pension deductions but paying out reduced pensions to many employees induced to retire early.

In conclusion the petitioner's claim under the ADEA requires review and remand to the district court under the guidelines of Holiday, id. and for the public interest.

3. THE DECISION OF THE DISTRICT COURT CONFLICTS WITH ITS RATIONALE OF ITS PRIOR DECISION IN KYRIAZI V. WESTERN ELECTRIC CO., ET AL., 461 F. SUPP 894 at 950 (1978), ON THE IMPORTANT ISSUE OF WHETHER THERE WAS TORTIOUS INTERFERENCE WITH PETITIONER'S CONTRACT OF EMPLOYMENT, HIS RIGHT TO PRACTICE HIS PROFESSION AND WITH HIS POSITION OF ADVANTAGE WITH RESPECT TO POTENTIAL EMPLOYMENT.

The differences are evident in comparing the decisions in the petitioner's cases Boyd v. Western Electric et al., 76-2427 and 76-2470 (79-1753 and 79-1754 on appeal) with the decision in the same court but with a different judge, namely: the decision in Kyriazi v. Western Electric Co., et al., 461 F. Supp. 894 at 950 (1978) A-52).

First there are differences in the rulings on similarities of tortious interference. In both cases the plaintiffs were engineers of the same classification of planning

engineer employed at the Kearny, N.J. works of Western. Kyriazi had six year's service whereas petitioner had twenty-six. Each had two master's degrees. Petitioner was forcibly retired with one day's notice to sign the early retirement agreement in 1973 and Kyriazi was dismissed on one-half hour's notice in 1971

The above employment relations are similar. But inconsistent rulings resulted. For example the district court (Judge Stern) ruled that Kyriazi had a contract of employment with Western, saying "Kyriazi has... proved...tortious interference with her employment contract with Western. "(Emphasis supplied) Kyriazi, id., In contrast, Judge Lacey in the same court ruled that petitioner "(h)ad no employment contract which... limited his employer with respect to a basis....for discharge." (A-38). Clearly the same court was in conflict on this important question

with the same facts.

For compensation to Kyriazi the district court (Judge Stern), reinstated Kyriazi with back pay and damages for her state claims which alleged "tortious interference with her employment contract...." (Emphasis supplied) Kyriazi, id., at 950 In contrast all the petitioner's similar claims on a motion for summary judgment by Western were dismissed (Judge Lacey). The court (Judge Stern) said in Kyriazi, id., "Compensatory and punitive damages will be awarded Kyriazi in an amount to be fixed...at a later time." Kyriazi, id., at 950 (A-52). This important decision should be reviewed because different judges in the same court ruled opposite on a very similar set of facts.

In addition, petitioner points to the discrepancy between Judge Lacey's court and Judge Stern's court on the important

question of whether the two employees, petitioner and Kyriazi had implied contracts of employment with Western. This contractual aspect of employment relationships for long service professional employees should be reviewed.

As an illustration the district court (Judge Lacey) clearly ignored the corporate defendant's glaring tortious interference with petitioner's position of advantage with respect to even a third party. This is shown in the following circumstance: in November, 1973 while petitioner was still employed by Western, the A. T. & T. Co., at 22 Cortlandt St., in N.Y.C. offered petitioner a superior position in marketing. This position was on a transfer basis, meaning that he would keep all his benefits such as pensions intact. Details of this negotiation are explained in depositions by Western on May 11, 12, 1978.

But the A. T. & T. Co. required petitioner to obtain Western's permission to take this desirable position. Petitioner asked Mr. Cuthbertson, works manager at Western's Kearny Works for permission to take this job but Mr. Cuthbertson refused. Therefore petitioner was prevented from obtaining the position. Here Western showed malice and deliberately tortiously interfered with petitioner's position of advantage, ruining his career and causing him to lose hundreds of thousands of dollars in salaries and other benefits such as pensions. But the district court refused even to discuss this issue and dismissed the whole case on Western's motion for summary judgment because according to Judge Lacey, an employee has no rights (A -39,40), This is in obvious distinction to the rulings of the court in Kyriazi, id. at 950. Judge Lacey gave no details.

For example in Kyriazi, id., the court

ruled that those guilty of such tortious interference included supervisors who interfered with Kyriazi's position as shown in the following part of its Opinion:

"Where one intentionally acts to deprive another of an economic benefit, including an employment relationship, the law of New Jersey confers a right of action on the party aggrieved." (A-52). Accordingly, Judge Stern cited as evidence of tortious interference, Kyriazi's supervisor's preventing her obtaining an offered position on a transfer to Western's Training and Research Center in Princeton. Therefore it is clear the two judges are exactly opposite on this important question and it is clear that Judge Stern's decision in Kyriazi, id., at 950 is a more creative and correct ruling on the relationships between employer and employees in very large corporations.

Finally it is obvious also that if per-

mission was required as explained above, for petitioner to accept a position with another company, here A. T. & T. Co., certainly petitioner must have had a contract of employment with Western implied or otherwise.

For definitions of "tortious interference" petitioner includes the following quotations from Judge Stern in Kyriazi, id., "(w)hen a party's deliberate conduct is so extreme that it intentionally interferes with another's ability to practice a profession or earn a livelihood (Emphasis added), then the wrongdoer must be punished and deterred..." Kyriazi v. Western Electric Co., 476 F. Supp. 335 at 340 (Sept. 12, 1979).

Also the district court in Kyriazi v. Western Electric Co., et al., 461 F. Supp. at 950 (1978) quoted Brennan as follows: "(t)he common law has long recognized... the right of every man to freely engage

in such lawful business or occupation as he himself may choose, free from hindrance or obstruction from his follow man..." Brennan v. United Hatters of North America, Local No. 17, 73 N.J.L. 729, 65A. 165 (Ct. of Errors and Ap's 1906).

Moreover the court discussed "tortious interference" as follows: "The court there (Brennan) isolated the elements of such a cause of action as consisting of (1) actual interference with an employment relationship which is (2) done with malice, that is, 'the intentional doing of a wrongful act without justification or excuse.'" Kyriazi v. Western Electric Co., et al., 461 F. Supp. 894 at 950 (1978).

The above defines "tortious interference" and it is clear that the district court judges in New Jersey differ among themselves on this issue. For example Judge Lacey ignored tortious interference

in petitioner's action and said, (A) private employer may terminate an employee at any time and for any reason..." (A- 39).

Another difference in decisions among judges in the district court occurred in connection with false information filed by Western in these court cases. For example in January, 1978 petitioner through Freedom of Information Act (FOIA) found Western had submitted false derogatory information re petitioner to the Dept. of Labor to defeat his Admininstrative ADEA complaint against Western. Judge Lacey refused to allow him to amend his complaint to include a count of libel. When petitioner filed another suit against Western on this issue, the district court (Judge Meanor) fined him over $5,000 for "harassing" Western.

In contrast, when Western from the same works at Kearny, N. J. similarly provided false information to the attorneys for

Kyriazi, id., the same court (Judge Stern) ruled Western had "(c)ommitted perjury" Kyriazi v. Western Electric Co., et al., 461 F. Supp. at 915 (1978). The court also awarded Kyriazi approximately $30,000 to pay fees of expert witnesses to counter this false information.

Therefore it is clear that different judges in the same court gave disparate treatment for similar events involving important issues and that these decisions should be reviewed.

4. THIS CASE SHOULD BE REVIEWED BECAUSE OF THE ISSUES OF THE DIFFICULTY OF RETAINING AN ATTORNEY TO PROSECUTE WESTERN AND THE DISTRICT COURT'S BIAS AGAINST THE RESULTING PRO SE STATUS OF THE PETITIONER.

This was not a fair or proper trial and the decision should be reviewed especially in view of the importance of the underlying issues. During the earlier stages of this

matter and prior to filing suit the petitioner consulted with numerous attorneys. requesting them to take the case. The petitioner was told either they were not experienced in this field, too busy or they required a retainer of at least $20,000. Attorneys who discussed this case expressed fear of taking cases of this type against Western because Western and their attorneys file endless motions and appeals. An example of legal fees in disputing a claim with Western is shown by the fact that the attorneys for Kyriazi, id. were awarded approximately $600,000 to litigate her state claims alone and a much larger sum for her sex bias claims. Petitioner, therefore was forced to go pro se although he preferred to be represented by an attorney.

Throughout the course of the district Court trial Judge Lacey advised petitioner to get a lawyer, ignored petitioner's discovery data and showed prejudice against

the petitioner.

The petitioner in response to Judge Lacey's suggestions regarding legal representation again searched for competent legal counsel. However at this stage of proceedings the amount demanded by experienced law firms became beyond the reasonable resources of petitioner. Kyriazi's attorney, Judith Vladek, Esq. was contacted by petitioner to represent him in these matters. Mrs. Vladek informed him she would not represent him although she reviewed the age discrimination count. Legal fees did not become an issue. Mrs. Vladek referred him to the firm of Ball, Broege, Elwell, Livingston and Roberts at 108 Washington St., Newark, N.J. However this firm also declined to represent the petitioner.

Because of the difficulty in obtaining an attorney, the petitioner had difficulty in 1978 in compelling Western to answer his

interrogatories in docket 76-2427 (79-1753 on appeal). He also faced problems in amending docket 76-2470 for fraud, and for libel resulting from the petitioner's learning under FOIA, of the false data about petitioner, submitted by Western to the Dept. of Labor, and for other counts. The petitioner had a legal right to amend once without a motion or permission of the court, as specified in Fed. R. of Civ. P. 15 (a), since Western had failed to file an answer to complaint 76-2470 (79-1753 on appeal). However, Judge Lacey apparently was annoyed at petitioner's still being pro se and ignored the petitioner's discovery data, refused to allow him to amend 76-2470, refused to discuss the apparent tortious interference by Western in preventing the petitioner from accepting the position offered him by A. T. & T. Co. in November, 1973, and dismissed both cases on motion by Western on Feb. 14, 1979.

As noted in the conclusions, if certiorari is granted the Urban Legal Clinic of Rutgers University Law School has given the petitioner permission to state that they are willing to represent the petitioner before the Supreme Court of the United States.

For all the above reasons the petitioner's trial was not proper with respect to the above important issues and should be reviewed.

SUMMARY

This is a landmark case of a large corporation coercing an older employee into signing an early retirement contract to conceal mismanagement by the employer and on contract terms grossly unfavorable for the employee. The case is further distinguished by the employee's having written words signifying coercion, right on the said retirement contract form. The employee has

been in court six years on the issues of the retirement contract and age discrimination with no success. This case illustrates the difficulties of an employee suing a very large corporation with what attorneys say is a good case, but without large resources of capital, since attorneys say they are afraid to tackle this huge corporation. Kyriazi, id., was nine years in court.

CONCLUSIONS

For the above reasons, it is respectfully prayed that a writ of certiorari should be issued to review the judgment and decision of the United States Court of Appeals for the Third Circuit in these cases.

Professor Louis Raveson of the Urban Legal Clinic of the Rutgers University Law School has given petitioner permission to state that the Urban Legal Clinic is willing to represent the petitioner before the Supreme Court of the United States in prosecuting this case, if the Court grants this

writ of certiorari.

Respectfully submitted

John E. Boyd
JOHN E. BOYD-PRO SE
202 W. Dudley Ave.
Westfield, N.J. 07090
(201) 232-8691

June, 1981

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Certiorari and the attached Appendix, were mailed or delivered to Edward P. Lynch, Pitney, Hardin & Kipp, Attorneys for the defendants, at 163 Madison Ave., Morristown, N.J. 07960, on 25 day of June, 1981.

John E. Boyd

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June, 1981

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 75-2042

JOHN E. BOYD,
Plaintiff,

v.

WESTERN ELECTRIC, ETC., ET AL.
Defendants.

OPINION

Appearances:

Mr. John E. Boyd
Pro Se

Pitney, Hardin & Kipp, Esqs.
Attorneys for Defendants.
BY: Joseph S Fortunato, Esq.

MEANOR, District Judge.

Defendants have filed motions to dismiss the case for lack of subject matter jurisdiction. Alternatively, defendant DeButts moves to dismiss the case for failure to state a valid claim for damages against him.

After a hearing on the DeButts

motion, but before a hearing on the jurisdictional question, plaintiff moved to substitute two allegedly diverse defendants and to drop the individual New Jersey defendants. He also moved to bifurcate the case.

MOTION TO SUBSTITUTE

In the present posture of the case, the court clearly has no jurisdiction by reason of diversity; defendants Newill and Haycock are New Jersey resients, as is plaintiff. And plaintiff asserts in his complaint that Western Electric, a New York corporation, has its principal place of business in New Jersey; it is, therefore, also non-diverse with plaintiff because for purposes of diversity, a corporation is

deemed to be a resident of both its state of incorporation and principal place of business. 28 U.S.C. §1332 (c)

Plaintiff moves to substitute two non-New Jersey residents for the individual New Jersey defendants, but it is clear that even if this relief were granted, the court would still lack jurisdiction because every party on each side of the case must be diverse with every party on the other side. Strawbridge v. Curtiss 3 Cranch (7 U.S.) 267 2 L Ed. 435 (1806); Seyler v. Stueben Motors, Inc., 462 F. 2d 181 (3d Cir. 972). Plaintiff's motion for substitution is, therefore, denied.

MOTION TO DISMISS: JURISDICTION

The 11 Counts of the complaint

can be broken into three groups. First, Counts I-III, VIII, X and XI do not attempt to assert a claim for relief arising under the constitution or laws of the United States, but rather are only State law claims. A second group, VI, VII and IX attempt to state a claim arising under the laws of the United States, but, as discussed below, the court finds they do not. At best, they state claims arising under state law and must, therefore, be treated in the same manner as the first group on a motion to dismiss. The third group, Counts IV and V can only be construed to assert a claim arising under the laws of the United States.

Because the court has found that it lacks diversity jurisdiction over the

case, the only way it may retain the state claims is if it finds that they are ancillary to a properly pleaded federal question and are, therefore, within the pendent jurisdiction of the court. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). However, as discussed below, the Court has found no properly pleaded federal question, and, therefore, the entire case must be dismissed for lack of subject matter jurisdiction.

First, the reasons for finding the counts in the second group fail to state a federal question are herein briefly set out.

Count VI alleges plaintiff was damaged by defendants in retaliation for testifying before the Federal Communications

Commission during an investigation into the American Telephone and Telegraph Co., and its subsidiary, defendant Western Electric. In his memorandum in opposition to defendants' motions, plaintiff asserts that the First and Fourteenth Amendments to the Constitution are involved. The court finds this Count does not state a claim for relief under the Constitution because requisite state action is not present. See Holadnak v. Avco Corp., 514 F.2d 285 (2d Cir.) cert.denied 46 L. Ed. 2d 123 (1975).

****

Plaintiff's allegations, insofar as they are relevant to the motion to dismiss as to Count IV, alleging a violation of the Age Discrimination Act of

1967, 29 U.S.C. §621 et seq., are as follows:

Plaintiff was asked by two employees of defendant Western Electric, defendants Haycock and Newill, on Autust 9, 1973 to execute a request for Immediate Special Early Retirement under threat of immediate dismissal with loss of all benefits. Plaintiff executed the form under protest on August 10, 1973. Plaintiff thereafter continued in the employ of Western until December 31, 1973.

After learning for the first time of the existence of the Age Discrimination Act plaintiff telephoned Thomas Davine (sic) of the Wage and Hour Division of the Department of Labor, Newark Office, on October 24, 1973 and informed him of his intent to sue Western for

violations under the Act.

On December 3, 1973, plaintiff telephoned Mr. Freidman of the Newark Office of the Department of Labor and repeated his intentions. Mr. Freidman recommended plaintiff retain counsel.

Plaintiff apparently telephoned Mr. Freidman on December 10, 1973 and again repeated his intention.

On July 16, 1975, plaintiff wrote to the Department of Labor, Age Discrimination Division, in Newark indicating that he was "proceeding with the case against Western Electric based on age discrimination." On July 28, 1975, plaintiff filed an employment information form which had been sent to him by

the Labor Department. Receipt of this was acknowledged on August 4, 1975 in a letter from Mr. Clark of the Newark Office who stated that conciliation was being attempted.

On December 4, 1975, plaintiff wrote to the Secretary of Labor advising him of his intent to sue under the Act. Acknowledgement of receipt of this letter was in a letter dated December 16, 1975 stating that the Department would attempt to conciliate. In addition, plaintiff received another letter from the Newark Office acknowledging the letter sent to Washington, and assigning Mr. T. Kelly to attempt conciliation.

Plaintiff had already filed this lawsuit on December 1, 1975.

Defendants assert that the court lacks jurisdiction over any claim arising in this case under the Age Discrimination Act because plaintiff did not give proper notice of his intention to sue to the Secretary of Labor within 300 days[1] of the alleged violation in accordance with 29 U.S.C. §626 (d)

A preliminary question is: when did the alleged act of discrimination occur so as to start the limitations period? First, the fact that plaintiff may yet be suffering some consequential damages, such as a lower pension payment,

---

[1]Because New Jersey has a law providing for redress against employers who discriminate on the basis of age, N.J.S.A. 10: 5-1 et seq., the 300 and not the 180 day limitation on notice applies. 29 U.S.C. §633(b)

does not render the discriminatory act a "continuing violation" so as to toll the period of limitations. Hiscott v. General Electric Co., 521 F.2d 632(6th Cir. 1975).

Second, plaintiff contends that because defendant Western did not post notices near his office regarding employees' rights under the act in accordance with 29 U.S.C. §627 that the limitations period should be considered tolled for the time in which the notices were not posted. The case law is in conflict on the effect of a violation of §627 on the running of the period. Compare, Hiscott v. General Electric Co., 521 F.2d 632 (6th Cir. 1975) with Skogland v. Singer Co., 403 F. Supp. 797 (D. N.H. 1975) and Bishop v. Jelleff Associates, 398 F. Supp. 579 (D. D.C. 1974). However,

Plaintiff does admit learning of the Act and making his first call in October, within a few months of the August 9, 1973 incident. He could not benefit from the non-compliance beyond the date on which he acquired actual knowledge of his rights. Cf. Edwards v. Kaiser Aluminum & Chemical Sales Inc., 515 E2d 1195 (5th Cir. 1975).

Thus, the violation either occured on August 9 or 10, 1973 and the limitations began to run as late as October 24, 1973, or both the violations occurred and the period began on December 31, 1973, the date on which plaintiff actually entered retirement.

If the act of discrimination occurred before December 1, 1973, Count IV

would be dismissed of necessity because the complaint was not filed within two years of the act of discrimination as required by 29 U.S.C. §§255 and 626 (e), and no "willful" violation of the act is alleged so as to extend the period for three years. Bishop v. Jelleff Associates supra, 398 F. Supp. at 593. However, the court finds that the violation occurred on December 21, 1973, the day plaintiff actually entered the alleged forced retirement. If the action of defendants was because of plaintiff's age, it was on that day that it became discriminatory since, between August 10 and then, plaintiff apparently continued to enjoy the same emoluments as other employees.

Plaintiff alleges that his telephone calls to the Newark office of

the Department of Labor, during which he indicated his intention to sue, constituted sufficient notice under the 300 day requirement of §626 (d) to preserve his right to sue. Unlike many other notice provisions in the regulatory scheme, The Department of Labor has not specified in regulations what constitutes sufficient notice under the Act. See 32 CFR. §750.53(b) defining notice for a claim pursuant to the Military Claims Act., 10 U.S.C. 2733. In addition, the courts are not in harmony on the question of whether a telephone call can be sufficient, or whether written notice is required within the period. Compare, Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973) with Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973). In Woodford, where

telephone notice was found sufficient, the court required the notice to include at least the identification of the employee and employer, and a communication of facts, which, if true, would support a cause of action pursuant to the Act. 369 F. Supp. at 915.

However, the Circuit Courts of Appeals agree that adequate notice is a jurisdictional requirement. See Hiscott v. General Electric Co., supra; Edwards v. Kaiser Aluminum & Chemical Sales Inc., 515 F 2d 1195 (5th Cir. 1975)

Regardless of what was communicated by plaintiff in his two calls he allegedly made before expiration of the 300 day period, this case is complicated by an additional factor. As noted, be-

cause New Jersey has a law protecting employees against age discrimination, the longer limitations period applies to the notice requirement. Section 633 (b) provides that in a case concerning an unlawful employment practice in such a state, "...no suit may be brought under 626 of this title (29) before the expiration of sixty days after proceedings have been commenced under the State Law..." It has been held by the Third Circuit that this section creates an exhaustion of State remedies requirement so that no suit may be brought in federal court until the employee has given the appropriate New Jersey agency a chance to settle the dispute. Goger v. H. K. Porter Co., Inc., 492 F. 2d 13 (3d Cir. 1974); McGarvey v. Merck & Co. Inc., 359 F. Supp. 525 (D. N.J. 1973),

vacated 493 F. 2d 1401 (3d Cir. 1974).

The court in Goger noted its agreement with the district court that the act did not require the filing of the complaint with the state agency as a "condition-prececedent to filing a suit in federal court. But it compared §626 (d) to the nearly identical provision of Title VII, 42. U.S.C. §2000e-5(c), which has been repeatedly construed to evidence a strong legislative policy "requiring that appropriate state agencies be given a prior opportunity to consider discrimination complaints before resorting to federal courts." Id. at 15-16. Thus, although this requirement is probably not jurisdictional, Skogland v. Singer Co., 403 F.Supp. 797 (D. N.H. 1975), it can in this circuit bar relief in the

federal court. However, in Goger, the court remanded the case to allow the plaintiff to proceed to the merits of her claim because at the time of the relevant events there had yet been no judicial decision so construing §633(b).

Goger was decided on January 31, 1974. The court has found that the alleged discriminatory act herein occured on December 31, 1973. Thus, when the decision was announced plaintiff had approximately 150 out of 180 days remaining to file a claim with the state to protect his federal remedy. N.J.S.A. 10:5-18.

It could be argued that plaintiff should be relieved from the effect of the Goger rule because he is pro se, because he had already given some

oral notice to the federal agency, or because of the remedial purposes of the legislation. Cf. Goger, Id. at 17. But to create exceptions for these reasons would emasculate Goger. Plaintiff himself may have had some rights under the Act. He has related in his memorandum that upon contact with the Newark Office of the Labor Department he was advised to consult an attorney. Instead, plaintiff chose to appoint himself as counsel in an area of the law complicated by administrative and judicial requirements in both the state and federal systems. Further, an unfavorable disposition on this count will not deprive plaintiff of the several remaining common law claims which he can certainly bring in state court.

For all the above reasons,

Count IV of the complaint is dismissed.

Count V alleges that plaintiff has been a victim of a violation of the Taft-Hartley Act. Specifically, plaintiff alleges his employer has discriminated against him for membership in or activity for one or more professional engineer's unions. Facts supporting the alleged discrimination are not spelled out however, it appears that plaintiff is alleging an alternative ground for challenging his forced early retirement.

Section 8 of the Act makes it an unfair labor practice for an employer to interfere with or discriminate against an employee who exercises rights secured by §7 of the Act to participate in union activity. 29 U.S.C. §§157 and 158(a) (1)-

(3). If, as is alleged, plaintiff was terminated or forced to retire under threat of termination, this could amount to an unfair labor practice.

However, Count V must be dismissed because before relief is possible in this court, resort must be made to the National Labor Relations Board. See San Diego Building Trades Council v. Garmon, 3L.Ed.2d 775 (1959); Sears Roebuck & Co. v. Solien, 450 F.2d 353 (8th Cir. 1971), cert. denied 405 U.S. 996 (1972); Atchson, Topeka and Santa Fe Ry. Co. v. Locals Nos. 70, 85, & 315, 511 F 2d 1193 (9th Cir. 1975); 29 U.S.C. Sec. 160. Until this has been done, the district court lacks the power to consider the matter. Count V is, therefore, dismissed.

Because the entire case must be dismissed, the court need not consider the additional motions of both plaintiff and defendant.

Defendants shall submit an appropriate order.

Dated August 12, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Nos. 76-2427
76-2470

JOHN E. BOYD,

Plaintiff,

MEMORANDUM OPINION
TRANSCRIPT OF PROCEEDINGS

v.

WESTERN ELECTRIC, a corporation, and THEODORE G. CLARK,

Newark, New Jersey
February 14, 1979

Defendants

BEFORE:

The Honorable Frederick B. Lacey, U.S.D.J.

Appearances:

JOHN E. BOYD
Pro Se

MESSRS. PITNEY, HARDIN & KIPP
By: EDWARD P. LYNCH, ESQ.,
and MYLES C. MORRISON, III ESQ.
for the Defendants

THE COURT: This matter is before the court on plaintiff's motion to amend the complaint in 76-2470, the defendants' motion to dismiss in the same action, and the defendants' motion for summary judgment in 76-2427.

On May 8, 1978, the complaint in 2470 was dismissed in its entirety. Due to the fact that the plaintiff proceeds here pro se and on his representation that he had omitted certain allegations from his original complaint and two subsequent amendments thereof, this court granted him leave to amend one more time to attempt to state a claim for fraud. At the time it was noted by me that the amended complaint would have to comply with the pleading requirements of Rule 9 (b) of the Federal Rules of Civil Procedure.

By notice sent out in December the pro se plaintiff and counsel for the defendants were notified that this case was on the trial list, and additionally they were noticed for pretrial for January 18, 1979. Plaintiff had still by that time not filed any amendment to the complaint with respect to the fraud allegations.

The pretrial conference, of course, could not go forward on 2470 and thereafter on January 23 the defendants moved to dismiss with the plaintiff's third amended complaint being filed the following day, January 24.

The amended complaint is 29 pages long and it is in four counts.

These counts are labeled "Fraud," "Libel and Slander," "Reverse Racial Discrimination" and "Res Ipsa Loquitur." As with all prior versions of the complaint, this one centers on the allegation that the plaintiff was forced under duress to sign an application for voluntary "special early retirement." The plaintiff contends that he was given the choice of signing this application or of being terminated and, indeed, he so states on a writing that he made at the time.

As I have noted, the second, third and fourth counts, because they are beyond the scope of the permission to amend that I had granted, will not be permitted to be asserted. I will address myself now with respect to the motion to

amend only as to the fraud count and the defendants' motion to dismiss.

As I have noted before in this litigation, Rule 15(a) of the Federal Rules of Civil Procedure Provides that "A party may amend his pleading only by leave of court and leave shall be freely given when justice so requires." It is accepted, of course, that courts have recognized that the rule requires them to look favorably upon requests to amend. Nonetheless, motions for leave to amend are still committed to the sound discretion of the trial court and what I am presented with at this time really is in that form, namely, a motion for leave to amend. I must look at it in those terms because what has been done here scarcely falls within the tenor or words of the

permission previously granted by this court to the pro se plaintiff to amend. This is so not only because of the content of the proposed amended document but also because of the time which has elapsed since May of 1978 when permission to amend was granted. I will deal with both of these factors.

****

It is noted that the original complaint was filed on December 30, 1976. On April 24, 1978, the plaintiff moved for leave to file an "Amended Amended Complaint" to revolve "around two legal concepts, a) conspiracy to injure plaintiff and injury to plaintiff and b) fraud." By order filed May 17, 1978, the amended amended complaint was dismissed in its entirety, except that the plaintiff was granted leave to file an addi-

tional amended complaint in fraud complying with the specificity requirements of Rule 9 (b) of the Federal Rules of Civil Procedure.

****

The filing on January 24 took place only after what I deem was "undue delay" and I have not been presented with a satisfactory explanation of why it took eight months to get this amendatory paper filed.

Even if the amended complaint filed on January 24 were permitted to stand, plaintiff would fare no better since based upon my examination of the complaint I would be compelled to grant defendants' motion to dismiss.

Federal Rule of Civil Procedure 9(b) states in pertinent part: "In all averments of fraud... the circumstances constituting fraud... shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."

Under New Jersey law the essential elements of actionable fraud are: "A false representation, knowledge or belief by the defendant of the falsity, an intention that the plaintiff act thereon, reasonable reliance in acting thereon by plaintiff, and resultant damage." Louis Schlesinger Co. v. Wilson, 22 N.J. 576, 585-86 (1956).

To state a claim with particularity as required by Rule 9(b) "means

that the pleader must state the time, place and content of the false misrepresentation, the fact misrepresented and what was obtained or given up as a consequence of the fraud." 2A J. Moore, Federal Practice, Para. 9.03 at 1925-1928.

The plaintiff lists a series of "items" A through Z (A) in what apparently is an attempt to satisfy the foregoing criteria. Examining these items it is clear that they depart from what was intended by my order of May, 1978 in that many of the "items" must be dismissed for the reason that they raise new matters beyond the scope of the permission granted to amend. In that respect the following raise new matters: A, C, H, I, J, L, M, N, O, P, Q, R, S, T, U, V, W, X and Y.

Thus, it only remains to inquire whether "items" B, D, E, F, G, K, W, Z and Z(A) conform with the pleading requirements.

B relates to alleged misrepresentations concerning the availability of transfer opportunities within the defendant's corporate structure. No specific statement is alleged nor is the person by whom the statement was made named or designated nor is the place stated.

Additionally, B recites that the plaintiff investigated the representations made to him, thus undercutting the requisite element of reliance.

D fails to allege the essential elements of fraud with sufficient particularity.

E is lacking the statement of the place where the alleged fraudulent statements were made.

F is insufficiently particular.

G sets forth neither the speaker nor the place where the statement was allegedly made.

K is insufficiently particular as are W, Z and Z(A).

Accordingly, even were I to allow the amended complaint I would have to grant the defendants' motion to dismiss. This dismissal would not be accompanied by further permission to amend since this would be the third effort made by plaintiff to state a claim. There comes a time when even pro se plaintiffs

must be informed that the court can permit no more amendments.

With respect to action 76-2427, the defendants have moved for summary judgment. In support of the motion they have filed a brief and affidavits of Myles C. Morrison, III, Esq., and Andrew J. Davis. The plaintiff has not filed responding affidavits.

The instant motion is based on two separate theories. First, it is contended that disposition of a similar action in State Court is res judicata as to this action. Second, based on the moving affidavits and deposition of the plaintiff it is contended that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

The essential facts are that the plaintiff was employed by Western Electric Company at its Kearny plant from 1947 through 1973, or approximately 26 years. On August 10, 1973, the plaintiff signed an application for special early retirement (SERP) on which he wrote: ". . . this form has been signed under deliberate pressure from Mr. Newill and Mr. Cuthbertson to sign or be terminated." As I have noted, the form was signed on August 10, 1973. Plaintiff retired as of December 31, 1973.

Plaintiff's position seemingly is that he signed the form under the threat of discharge and that this constituted "duress." His reasoning follows from that basic proposition as follows: Since were he to be terminated he would not fare as

well in posttermination benefits as he would under special early retirement, he was forced to sign the SERP to avoid being discharged.

Plaintiff is unwilling to recognize that the "duress" evaporates when it is understood that because his employment was at will his employer had the right to terminate him at any time. He was giving up no rights whatever. His effort here in oral argument this morning to say that he never believed that they were going to terminate him anyway, while superficially attractive as an argument, falls apart under close scrutiny. The fact is that the plaintiff himself throughout the course of this litigation has relied upon the writings as expressing the situation truly and as a matter

of fact.

Moreover, his sworn testimony in depostion nowhere supports the unsworn declaration made here this morning that he never believed that they intended to terminate him.

Finally, of course, with respect to this belatedly contrived declaration, if the plaintiff did not believe that he was going to be terminated, then there was in fact no duress.

Putting aside the position taken this morning in open court, and dealing with what has been the plaintiff's position throughout until today, it is the law of New Jersey, as has been repeatedly made clear to the plaintiff by this court and by the Superior Court of Union County

that the issue is whether the defendants had the right to terminate him at any time or for any reason.

Dealing with the averments submitted by the defendants on this motion, see Federal Rule of Civil Procedure 56(e), and noting that the averments of those submissions are undenied by the plaintiff, the Davis affidavit establishes that during the plaintiff's tenure with Western Electric he was not a member of a collective bargaining unit and was employed only for an indefinite term. He had no employment contract which specified the duration of the employment relationship or limited his employer with respect to a basis or bases for discharge. The pension plan under which plaintiff is currently receiving pension benefits con-

tains no provision guaranteeing employment for a specific length of time.

Given the above facts, one must look to the plaintiff to present facts in rebuttal to raise a genuine issue of material fact. Plaintiff has failed to carry his burden in this respect and, therefore, summary judgment must be entered against him.

The law of New Jersey is clear that a private employer may terminate an employee at any time and for any reason so long as no statutory, contractual or constitutional right is thereby violated. English v. College of Medicine and Dentistry, 73 N.J. 20, 23 (1977); Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 197 (1961); Schlenck v. Lehigh Valley Rail-

road Co., 1 N.J. 131, 135 (1948).

Plaintiff has characterized the law of New Jersey in this respect as "grey" but has given no statutory or additional authority upon which he relies to thus characterize the law of this state. The Davis affidavit establishes beyond dispute that the employment relationship was one at will and, therefore, no right of the plaintiff was violated when he was to accept his designation, forced to retire as an alternative to being terminated. Accordingly, the defendants would be entitled to summary judgment on the merits.

I note further that plaintiff's suit in the New Jersey State Court, Superior Court of Union County, L-43916-75. raises precisely the same issue as is raised in the matter before me: the le-

gality of the plaintiff's termination. Plaintiff states that the complaints in the two actions are not identical and undeniably this is so. The point is, however, that the same claims are asserted.

As the record will reflect, I have read pertinent portions of the complaint in the State Court action into this record and the colloquy between the State Court judge and the plaintiff is made a part of these proceedings as an exhibit to the Morrison affidavit. Summary judgment was granted in favor of the defendants by the State Court in L-43916-75 by order filed August 8, 1978. Plaintiff advised that he has filed a notice of appeal from that determination.

The defendants' counsel raises

the doctrine of res judicata arguing that the State Court determination is binding upon this court. Under New Jersey's final judgment rule, the final judgment of a trial court, "unless stayed, is valid effective for all purposes until reversed or modified by an appellate court." Koppel v. Olaf Realty Corp., 62 N.J. Super. 103, 112(App. Div. 1960). "The judgment of a court of competent jurisdiction on a question of law or fact or on a mixed question of law and fact, once litigated and determined, is, so long as it stands unreversed, conclusive upon the parties and their privies." Newark v. North Jersey District Water Supply Commission, 106 N.J. Super. 88, 99(Div, 1968). Thus Judge Coleman's ruling is dispositive of the claim raised here by the plaintiff

until such time as it may be reversed. See McCusker v. Commonwealth Casualty Co., 106 N.J.L. 116, 118 (E&A 1930).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN E. BOYD,	)THE HONORABLE FREDERICK B.
Plaintiff,	)LACEY
vs.	)Civil Action
WESTERN ELECTRIC, a corporation, and THEODORE G. CLARK,	)No. 76-2427) ORDER
Defendants.	)

This matter having been brought before the Court, the Honorable Frederick B. Lacey presiding, on Tuesday, February 13 and Wednesday, February 14, 1979, by Pitney, Hardin & Kipp (Edward P. Lynch, Esq. appearing) attorneys for defendants Western Electric Company, Incorporated and Theodore G. Clark, on defendants' motion for summary judgment in their behalf and in the presence of John E. Boyd, plaintiff, pro se and the Court having considered the papers submitted by the parties in support of and in opposition to said motion, and the arguments of both parties, and good cause appearing, in accordance with the

(ORIGINAL FILED FEB 28, 1979)

Memorandum Opinion rendered from the bench, on February 14, 1979:

It is on this 28 day of Feb., 1979 ORDERED that defendants' motion for summary judgment be and same hereby is granted and plaintiff's complaint is hereby dismissed with prejudice on the grounds that:

1) Plaintiff has failed to present facts to rebut those averments submitted by defendants in support of their motion and hence has raised no genuine issue of material fact; therefore plaintiff has failed to carry the applicable burden in opposing a motion for summary judgment; and

2) Under the applicable law of New Jersey, there being no genuine issue of material fact, defendants are entitled to judgment as a matter of law; and

3) The ruling by Judge James C. Coleman, Jr. in plaintiff's related action,

Docket No. L-43916-75, filed in the Union County Superior Court is dispositive of the claim raised in the instant action under the doctrine of res judicata and New Jersey's final judgment rule.

FREDERICK B. LACEY U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN E. BOYD,	)THE HONORABLE FREDERICK B.
Plaintiff,	)LACEY
vs.	)Civil Action No. 76-2470
WESTERN ELECTRIC, a corporation, and THEODORE G. CLARK,	) ORDER
Defendants.	) Filed Feb. 28,)1979

This matter having been opened before the Court, the Honorable Frederick B. Lacey presiding, on Tuesday, February 13, 1979 and Wednesday, February 14, 1979 by Pitney, Hardin & Kipp (Edward P. Lynch, Esq. appearing) attorneys for defendants Western Electric Company, Incorporated and Theodore G. Clark, on defendants' motion for an Order dismissing the amended, amended Complaint in the above-captioned matter with prejudice and without leave to amend, and by John E. Boyd, plaintiff, pro se, on plaintiff's motion to amend the amended, amended Complaint in the above-captioned matter, and the Court

having considered the papers in support of, and in opposition to said motion, and the oral argument of the parties, and in accordance with the Memorandum Opinion of the Court as rendered from the bench on Feb. 14, 1979, and good cause appearing:

It is on this 28 day of Feb., 1979, ORDERED that plaintiff's motion to amend the amended, amended Complaint is denied on the ground that plaintiff has failed to proceed in this matter in good faith in that he failed to file his motion to amend the Complaint until more than eight months had elapsed from the date of this Court's grant of leave to file an amended Complaint on May 17, 1978, and that such conduct by plaintiff constituted undue delay for which plaintiff advanced no satisfactory explanation.

It is furthur ORDERED that were this Court to have granted plaintiff's motion to amend the amended, amended Complaint it

would be compelled to grant defendants' motion to dismiss on the grounds that:

1. The First Count of plaintiff's proposed amended complaint, which is entitled "Fraud" contains numerous so-called "Items" which are beyond the scope of this Court's earlier grant of leave to amend as to fraud, "items" so exceeding that grant being A, C, H, I, J, L, M, N, O, P, Q, R, S, T, U, V, W, X, and Y; and

2) The remainder of the "Items" comprising the First Count fail to comply with the pleading requirements set forth in Fed. R. Civ. P. 9 (b) in that they fail to alleged the essential elements of and with sufficient particularity; and

3) Counts 2, 3 and 4 concern matters which are beyond the scope of this Court's May 17, 1978 grant of leave to amend and are therefore improper.

FREDERICK B. LACEY, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 79-1753 and 79-1754

JOHN E. BOYD

Appellant

vs.

WESTERN ELECTRIC, a corporation
JOHN D. DEBUTTS and THEODORE G. CLARK

(D.C. Civil Nos. 76-2427 and 76-2470)

ON APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)

December 8, 1980

Before SEITZ, Chief Judge, MARIS and GIBBONS,

Circuit Judges

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Attorneys for Appellees, Western Electric Company, Incorporated, John D. Debutts and Theodore G. Clark

JUDGMENT ORDER

John E. Boyd appeals from a summary Judgment in favor of the defendants in his action seeking relief for an allegedly improper discharge, and from an order denying him leave to amend his complaint. He also moves that we review the dismissal of Count III of his original complaint, to which his initial brief was not addressed. That motion is granted. We find no disputed issue of fact and no legal error in the grant of summary judgment, and no abuse of discretion in refusing to permit further amendments.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs to be taxed in favor of appellees in both appeals.

By the Court,
JOHN J. GIBBONS
Circuit Judge

Attest:
Sally Mrvos, Clerk
Dated: Jan. 7, 1981

EXCERPTS FROM KYRIAZI V. WESTERN ELECTRIC CO., ET AL., 461 F. SUPP. AT 950 (1978)

* * * * * * * *

B. Kyriazi's State Law Claim

Kyriazi has alleged and proved a pattern of conduct on the part of co-workers and supervisors which amounts to a tortious interference with her employment contract with Western.

(27) Where one intentionally acts to deprive another of an economic benefit, including an employment relationship, the law of New Jersey confers a right of action on the party aggrieved.

(28) The Court is satisfied that Kyriazi's proofs at trial entitle her to recovery under the tort of malicious interference with her employment at Western. There is no need to find the facts a second time.

* * * * * * *

Accordingly, compensatory and punitive damages will be awarded Kyriazi in an amount to be fixed by the Court at a later time.

A-53

EXCERPTS FROM "SERP" (SPECIAL EARLY RETIREMENT) CONTRACT

WESTERN ELECTRIC COMPANY

APPLICATION FOR SPECIAL EARLY RETIREMENT

J. E. BOYD 532-24-8191 PLANNING
Employee's Name Soc. Sec. # Rank ENGINEER

* * * * * * * *

I have read the provisions of the Special Early Retirement Program and hereby request the Western Electric Co., Inc., to approve my participation....

* * * * * * * *

I further...agree not to accept employment with a company which is in...competition with Western Electric Co., for...two years....

Further, this form has been signed under deliberate pressure from Mr. Newill and Mr. Cuthbertson to sign or be terminated.
(signed) J. E. Boyd 8/10/73

This request is approved...with retirement effective January 1, 1974.

Approved L. Newill
Manager

8/10/73
Date

Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2186

In The

Supreme Court of the United States

October Term, 1981

JOHN E. BOYD,

Petitioner,

vs.

WESTERN ELECTRIC, A CORPORATION, JOHN D. DEBUTTS and THEODORE G. CLARK,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari was filed within the time required by 28 U.S.C. §2101(c).

2. Whether the court of appeals properly affirmed the district court's grant of respondents' motion for summary judgment on petitioner's claim of unlawful termination of employment.

3. Whether the court of appeals properly affirmed the district court's denial of leave to amend.

4. Whether the court of appeals properly affirmed the district court's grant of respondents' motion for summary judgment on petitioner's claim under the Age Discrimination in Employment Act.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents iii

Table of Citations iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions and Rules 1

Constitutional Provisions 1

Statutes 1

Rules 3

Statement of the Case 4

Summary of Argument 8

Argument:

I. The petition for a writ of certiorari was not filed within the time required by 28 U.S.C. §2101(c). .. 9

II. The court of appeals did not depart from well established principles in affirming the grant of respondents' motion for summary judgment on petitioner's claim of wrongful termination of employment. 10

Contents

Page

III. The court of appeals properly affirmed the district court's denial of leave to amend this complaint... 14

IV. The court of appeals properly upheld the district court's grant of summary judgment on petitioner's ADEA claim. 17

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Albee Homes, Inc. v. Lutman, 406 F. 2d 11 (3d Cir. 1969). 15, 16

Boyd v. Western Electric, Inc., 562 F. 2d 41 (3d Cir. 1977). 17

Brennan v. United Hatters, 73 N.J.L. 729, 65 A. 165 (E. & A. 1906) 12, 13

Cornell & Co. Inc. v. Occupational Safety and Health Review Commission, 573 F. 2d 820 (3d Cir. 1978) 14, 15

Cramer v. General Telephone & Electronics Corporation, 582 F. 2d 259 (3d Cir. 1978), cert. denied, 439 U.S. 1129 (1979) 16

Davis v. United States Steel Supply, Div. of U.S. Steel Corp., 581 F. 2d 335 (3d Cir. 1978) 13

Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971). 10

Contents

Page

Department of Banking v. Pink, 317 U.S. 264 (1942) 10

Federated Department Stores, Inc. v. Moitie and Brown, 49 U.S.L.W. 4687 (June 15, 1981) 17

Foman v. Davis, 371 U.S. 178 (1962) 14, 15

Hindle v. Morrison Steel Co., 92 N.J. Super. 75, 223 A. 2d 193 (App. Div. 1966) 12

Holliday v. Ketchum, McLeod & Grove, Inc., 584 F. 2d 1221 (3d Cir. 1978) 18

Jorgensen v. Pennsylvania R.R. Co., 25 N.J. 541, 138 A. 2d 24 (1958) 12

Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978) 12, 13

Landtect Corporation v. State Mutual Life Insurance Co. of America, 605 F. 2d 75 (3d Cir. 1979) 10

Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A. 2d 197 (1950) 12

Marshall v. Chamberlain Manufacturing Corp., 601 F. 2d 100 (3d Cir. 1979) 18

Meyer v. Bell & Howell Co., 453 F. Supp. 801 (E.D. Mo.), appeal dismissed, 584 F. 2d 291 (8th Cir. 1978) 12

Nevels v. Ford Motor Co., 439 F. 2d 251 (5th Cir. 1971).. 16

Contents

Page

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 18

Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A. 2d 505 (1980) 13

Raymond v. Cregar, 38 N.J. 472, 185 A. 2d 856 (1962) .. 13

Ross & Ross v. A.H. Robins Co., Inc., 607 F. 2d 545 (2d Cir.), cert. denied, 446 U.S. 946 (1979) 16

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944). 11

Schacht v. United States, 398 U.S. 58 (1970) 9

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 14

Statutes Cited:

Age Discrimination in Employment Act, P.L. 90-202, 81 Stat. 602 (ADEA):

29 U.S.C. §621 1

29 U.S.C. §626(d) 1

29 U.S.C. §633(b) 2

Judicial Code and Judiciary Act, c. 646, 62 Stat. 869:

28 U.S.C. §2101(c) ..... i, 2, 8, 9

Contents

Page

Rules Cited:

Federal Rules of Civil Procedure:

Rule 9(b) 3, 7, 15, 16

Rule 15(a) 3, 14, 15

Rule 56 10

Rule 56(b) 3, 6

United States Supreme Court Rules:

Rule 17 8

Rule 28.1 4

Rule 33.7 ..... 8, 10

Rule 34.1(b) 4

Other Authorities Cited:

3 Moore's Federal Practice:

¶15.08[4] 15

¶15.08[6] 15

6 Moore's Federal Practice, ¶56.15 11

Contents

Page

6 Wright & Miller, Federal Practice and Procedure, §1486 at p. 424 (1974) 15

APPENDIX

Excerpts of United States District Court Hearing Dated March 27, 1981 .....RA1

Excerpts of United States District Court Memorandum Opinion Dated February 14, 1979 .....RA4

OPINIONS BELOW

Respondents respectfully submit that the opinions below are adequately identified in the petition (PA23-51).[1] However, because petitioner has failed to include certain critical portions of those decisions respondents submit herewith a supplementary appendix.

JURISDICTION

Respondents respectfully submit that the facts relating to this Court's jurisdiction are adequately set forth in the petition. However, as shown *infra*, respondents respectfully submit that this Court is without jurisdiction to entertain the petition because it was not filed in a timely fashion.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Constitutional Provisions

Respondents respectfully submit that, contrary to the petition, no constitutional provisions are involved in this appeal.

Statutes

The Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (hereinafter the "ADEA"), §626(d) states in relevant part:

> "No civil action may be commenced by an individual under this section until the individual

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1. "PA" refers to petitioner's appendix; "RA" to respondents' supplementary appendix.

> has given the Secretary not less than 60 days' notice of an intent to file such action. Such notice shall be filed — (1) within 180 days after the alleged unlawful practice occurred. . . ."

29 U.S.C. §633(b) of the ADEA states in relevant part:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of 60 days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."

The Judicial Code and Judiciary Act, 28 U.S.C. §2101(c) states:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rules

Fed. R. Civ. P. 9(b) states:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Fed. R. Civ. P. 15(a) states:

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

Fed. R. Civ. P. 56(b) states:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof."

STATEMENT OF THE CASE

Petitioner John E. Boyd (hereinafter "petitioner") has filed six lawsuits relating to his separation from employment with Western Electric Company, Incorporated (hereinafter "Western") and events leading up to that separation.[2] In all of the suits Western has been a defendant.[3] All six actions have been dismissed by the trial court and petitioner has prosecuted appeals from these dismissals.[4] Petitioner now seeks to have this

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2. Pursuant to Sup. Ct. Rule 28.1, Western Electric Company, Incorporated, states that it is a wholly-owned subsidiary of the American Telephone and Telegraph Company.

3. Western Electric Company, Incorporated, and Theodore G. Clark are hereinafter referred to collectively as "respondents." Respondents note, pursuant to Sup. Ct. Rule 34.1(b), that Mr. deButts, although named as a defendant in the original complaints in the two cases here involved, was not named as a defendant in later amended complaints and is not, therefore, a party to this appeal.

4. The six actions filed by petitioner, designated *Boyd I* through *VI* for the convenience of the Court, and their status are as follows:

Boyd I — *Boyd v. Western Electric, John D. deButts, Lester T. Newill and Bethuel J. Haycock*, U.S.D.C. No. 75-2042 [dismissal affirmed *Boyd v. Western Electric, et al.*, 562 F.2d 41 (3d Cir. 1971); petitioner failed to properly file a Notice of Appeal with the Supreme Court of the United States despite of an extension of time to file granted by Justice Brennan on 12/9/77].

Boyd II — *Boyd v. Western Electric, John D. deButts, Donala Procknow and Lester T. Newill*, New Jersey Superior Court No. L-43916-75 (petitioner's appeal dismissed by the New Jersey Supreme Court in an unreported order, Docket No. 17,405, on 10/14/80).

(Cont'd)

Court review the decision of the United States Court of Appeals for the Third Circuit affirming the dismissal of his complaints in two cases, *Boyd IV* and *Boyd V*.

As the district judge found (PA35), the essential facts in *Boyd IV* and *V* are that on August 9, 1973, petitioner, who had been employed by Western at its facility in Kearny, New Jersey, was given an opportunity by Western to sign an application for Western's Special Early Retirement Program (S.E.R.P.). On August 10, 1973, petitioner signed an application for special early retirement on which he wrote: ". . . this form has been signed under deliberate pressure from Mr. Newill and Mr. Cuthbertson to sign or be terminated." In his complaints,

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(Cont'd)

Boyd III — *Boyd v. Western Electric, Lester T. Newill, John D. deButts and Donald Procknow*, New Jersey Superior Court No. L-40247-76 (petitioner's appeal dismissed by the New Jersey Supreme Court in an unreported order, Docket No. 17,405, on 10/14/80).

Boyd IV — *Boyd v. Western Electric, John D. deButts and Theodore G. Clark*, U.S.D.C. No. 76-2427 (dismissal of petitioner's complaint affirmed by the United States Court of Appeals for the Third Circuit in an unreported decision, No. 79-1753, on 12/8/80).

Boyd V — *Boyd v. Western Electric, John D. deButts, and Theodore G. Clark*, U.S.D.C. No. 76-2470 (dismissal of petitioner's complaint affirmed by the United States Court of Appeals for the Third Circuit in an unreported decision, No. 79-1754, on 12/8/80).

Boyd VI — *Boyd v. Western Electric*, U.S.D.C. No. 76-3693 (in unreported Memorandum Orders dated June 19 and July 24, 1980, petitioner was enjoined from instituting further vexatious litigation in the federal courts and Western was awarded costs and attorneys fees; an appeal is presently pending before the Third Circuit, No. 80-2677).

petitioner asserted that this application for special early retirement was not legally effective because it was signed "under duress."

In *Boyd IV* the district judge granted respondents' motion for summary judgment and dismissal of the complaint in a memorandum opinion on February 14, 1979 (PA23). The district judge found there was no question but that petitioner was, in effect, discharged from his employment with Western. He concluded that petitioner's allegations of "duress" relating to the early retirement agreement did not establish that the termination was improper. "[T]he 'duress' evaporates when it is understood that because his employment was at will his employer had the right to terminate him at any time. He was giving up no rights whatever." (PA35-37).

The district judge in his decision in *Boyd IV* noted that "[t]he law of New Jersey is clear that a private employer may terminate an employee at any time and for any reason so long as no statutory, contractual, or constitutional right is thereby violated." The district judge also found that petitioner had failed to present facts in rebuttal to respondents' summary judgment motion so as to raise "a genuine issue of material fact." Accordingly, he concluded that respondents were entitled to judgment as a matter of law under Fed. R. Civ. P. 56(b) (PA39-40).[5]

In *Boyd V*, at a hearing held on March 27, 1978, the district judge granted respondents' motion for partial summary

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5. In the alternative, the district judge found that the decision in petitioner's state court suits, *Boyd II* and *III*, had addressed precisely the same issues as were raised in *Boyd IV*, *viz.*, the legality of petitioner's termination. In light of the state court's prior dismissal of these claims, the district judge concluded that petitioner's claim was barred under principles of *res judicata*.

judgment on the ground that an identical claim under the ADEA had been dismissed in petitioner's first suit against respondents *Boyd I* (RA1-3).[6]

Subsequently, in *Boyd V* the district judge denied petitioner's motion for leave to file a third amended complaint. In a memorandum opinion on February 14, 1979, the district judge found that petitioner had acted in bad faith in submitting the proposed amended complaint some eight months after he was granted permission to attempt to amend and after the pretrial conference (PA24-34).[7]

On appeal the United States Court of Appeals for the Third Circuit affirmed, in a single judgment order, the decisions in *Boyd IV* and *V* (PA50-51). More specifically, with respect to the grant of respondents' motions for summary judgment on petitioner's claims under the ADEA and for wrongful discharge and with respect to the district court's refusal to grant leave to amend the court of appeals stated:

> "We find no disputed issue of fact and no legal error in the grant of summary judgment, and no abuse of discretion in refusing to permit further amendments." (PA51).

---

6. Petitioner did not raise this issue in his notice of appeal to the Third Circuit. Nevertheless, the Third Circuit permitted petitioner to address the issue in the *Boyd V* appeal (PA51).

7. As an alternative ground for denying leave to amend, the district judge found that the amended complaint was defective and would not be able to withstand a motion to dismiss. In this regard, the court examined each of petitioner's allegations of fraud and found that they did not allege the circumstances constituting fraud with particularity as required by Fed. R. Civ. P. 9(b) (PA30-34).

Petitioner now asks this Court to grant a writ of certiorari to review the judgment of the Third Circuit. Respondents submit this brief in opposition to that petition.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to entertain the petition because it was not filed within 90 days of the entry of the judgment below as required by 28 U.S.C. §2101(c). Petitioner's filing, within that 90 day period, of a brief not in conformance with the Supreme Court's Rules does not satisfy the jurisdictional prerequisites established by Congress. Even if Sup. Ct. Rule 33.7 does create an exception for improper but timely petitions, petitioner's failure to promptly substitute a corrected petition precludes application of that exception in this case.

Further, even if the Court had jurisdiction to entertain the petition, it should not be granted. Petitioner has failed to identify issues of law which would, under Sup. Ct. Rule 17, justify the grant of a writ of certiorari. Rather, his petition seeks to have this Court create exceptions to well established principles which the district court applied in granting respondents' motions for summary judgment and in denying petitioner leave to file a third amended complaint.

ARGUMENT

I.

The petition for a writ of certiorari was not filed within the time required by 28 U.S.C. §2101(c).

Pursuant to the provisions of 28 U.S.C. §2101(c), a petition for a writ of certiorari in a civil proceeding must be filed within 90 days of the entry of judgment. In the present action, the judgment order of the United States Court of Appeals for the Third Circuit was entered on January 7, 1981 (PA50-51). To be timely, a writ of certiorari must have been filed by April 7, 1981.

Although, a petition for a writ of certiorari was submitted by petitioner on March 4, 1981, it was rejected by the Clerk as not in conformance with the Supreme Court Rules.[8] A new petition was not filed and served until June 25, 1981, more than 90 days after the entry of judgment by the court of appeals.[9] As such, the petition was not timely filed and for that reason should be denied.

Congress has set the time for invoking the Court's jurisdiction in civil cases and, as this Court has recognized, a petition for certiorari must be denied when it is not filed within the time provided by law. As explained by Justice Harlan in his concurring opinion in *Schacht v. United States*, 398 U.S. 58, 68-69 (1970):

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8. Petitioner's nonconformance with the rules cannot be excused by his *pro se* status. Not only has petitioner pursued actions in state and federal court at the trial appellate levels, he previously attempted to appeal a decision to this Court in 1977.

9. While 28 U.S.C. §2101(c) allows a justice upon request to extend the time to apply for a writ of certiorari, no such application was filed here.

> "As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot 'waive' congressional enactments, the statutory time limits are treated as jurisdictional."

See Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971); *Department of Banking v. Pink,* 317 U.S. 264 (1942).

Supreme Court Rule 33.7 should not be applied in this case to excuse petitioner's failure to comply with the statutory time limitation.[10] Petitioner did not "promptly substitute" corrected copies of his petition as required by Rule 33.7. In fact, a new petition was not submitted until nearly four months after the initial petition. Under all of these circumstances, the petition should be denied because it was not timely filed.

II.

The court of appeals did not depart from well established principles in affirming the grant of respondents' motion for summary judgment on petitioner's claim of wrongful termination of employment.

The function of the trial court and the appellate court with respect to Fed. R. Civ. P. 56 is clear. As stated in *Landtect Corporation v. State Mutual Life Assurance Company of America,* 605 F. 2d 75, 79 (3d Cir. 1979), *quoting Goodman v. Mead Johnson & Co.,* 534 F. 2d 566, 573 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977):

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10. Respondents respectfully submit that Rule 33.7 should not apply under any circumstances to excuse the failure to comply with the time limitation for filing a petition for certiorari which as been set by Congress.

> "Rule 56 [Fed. R. Civ. P.] allows the trial court to grant summary judgment if it determines from its examination of the allegations in the pleadings and any other evidential source available that *no genuine issue as to a material fact remains for trial,* and that the moving party is entitled to judgment as a matter of law . . . *On review the appellate court is required to apply the same test* the district court should have utilized initially. Inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion. The nonmovant's allegation must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt."

And see, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); 6 *Moore's Federal Practice*, ¶56.15.

Here, the district judge properly found that the only issue presented by respondents' summary judgment motion in *Boyd IV* was whether Western had the right to terminate petitioner's employment in 1973.[11] Under the law of New Jersey,

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11. While petitioner contends that the courts below misunderstood the issue and that he was not actually terminated (Petition, p. 23), the district court noted that petitioner's deposition testimony and petitioner's own contemporaneous notation on the S.E.R.P. agreement indicate that he was faced with the alternatives of signing or being terminated (PA35, 53). The only difference between what happened to petitioner as a result of his having retired under S.E.R.P. and what would have happened had he been terminated without the benefit of S.E.R.P., is that he received additional benefits by virtue of having signed the S.E.R.P. application. Thus, as the district court found, petitioner gave up no rights by signing the application. Indeed, he actually benefited by accepting special early retirement (PA35-37). Accordingly, the only issue presented by the summary judgment motion was whether such termination was, or was not, lawful.

employment for an indefinite period of time may be terminated with or without cause, at the will of either party, so long as such termination does not violate any constitutional, statutory or contractual provision. *Jorgensen v. Pennsylvania R.R. Co.*, 25 N.J. 541, 554, 138 A. 2d 24, 32 (1958); *Hindle v. Morrison Steel Co.*, 92 N.J. Super. 75, 81, 223 A. 2d 193, 196 (App. Div. 1966). Thus, given petitioner's failure to show any facts which might establish such a limitation on Western's right to terminate his employment, the district court properly granted the motion for summary judgment on petitioner's claim for wrongful discharge.

Similarly, petitioner's theory (Petition, pp. 32-44) that his termination constituted tortious interference with employment was unsupported as a matter of law. Petitioner failed to establish the critical prerequisites to such an action, *i.e.*, that a third party maliciously or without justification interfered with an actual, or reasonably probable, employment relationship. *Brennan v. United Hatters*, 73 N.J.L. 729, 740-43, 65 A. 165, 170-74 (E. & A. 1906); *Louis Schlesinger Co. v. Rice*, 4 N.J. 169, 180, 72 A. 2d 197, 203 (1950). Accordingly, there was no basis for proceeding on a theory of tortious interference with employment. *See Meyer v. Bell & Howell Company*, 453 F. Supp. 801, 802 (E.D. Mo.), *appeal dismissed*, 584 F. 2d 291 (8th Cir. 1978).[12]

In this connection, petitioner (Petition, pp. 32-41) mistakenly places great reliance on *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894 (D.N.J. 1978). He apparently contends

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12. In the alternative, the district court found that the claim presented in the instant action — the lawfulness of petitioner's termination — was previously raised and decided by the New Jersey Superior Court in *Boyd II* and *III*. Given this identity of claims and the fact that Western and its privies were the defendants in both actions, the district judge properly held that the prior dismissal of the claim was a bar to the relitigation of that issue under the doctrine of *res judicata* (PA40-45).

that *Kyriazi* established the rule that professional employees at Western's Kearny facility automatically enjoyed a contract of employment (although such a contract was not agreed to, written, or signed by the parties) and, therefore, could not be discharged without cause. No such rule of law was established in *Kyriazi.* It is readily apparent from a fair reading of the *Kyriazi* opinion that the single, introductory allusion to a contract was used as a shorthand description for an employment relationship.[13]

Petitioner also argues that the lower courts improperly disregarded the public interest in upholding his discharge (Petition, pp. 30-31). This concept was not pleaded in the complaint, and, for that reason alone, should be disregarded. In any event, petitioner's suggestion is without merit.

While a number of jurisdictions have recognized that considerations of public policy may, in certain cases, impose some restraint on an employer's right to terminate an at will employee, none of those limitations are relevant here. *See Davis v. United States Steel Supply, Div. of U.S. Steel Corp.*, 581 F. 2d 335, 340 (3d Cir. 1978); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A. 2d 505 (1980). The public interests raised by petitioner — loss to the government of income tax and

---

13. The district court in *Kyriazi* made no specific finding that Kyriazi had an employment contract, or that any employment contract had been breached. Rather, it held that Kyriazi was entitled "to recover under the tort of malicious interference with her employment at Western." *Kyriazi, supra,* at 950. Further, as the *Kyriazi* court's reference to *Brennan v. United Hatters of North America, Local No. 17, supra,* 73 N.J.L. 729 and *Raymond v. Cregar,* 38 N.J. 472, 185 A. 2d 856 (1962) indicates, the finding was based on the tort of malicious "interference with an *employment relationship.*" *Kyriazi, supra,* at 950 (emphasis added). Finally, there are no specific findings of fact supporting the court's reference to an "employment contract," and the existence of such a contract was in no way material to that case.

adverse impact on social security funds — would apply when any employee is terminated and are so broad as to be obviously outside the scope of any possible exception.

Petitioner also raises claims of constitutional violations (Petition, pp. 19-23) never pleaded in the district court in this case. This attempt to litigate new issues on appeal is entirely improper and should be rejected. Moreover, the claims are without merit. Petitioner's discharge by Western, a private employer, does not contravene federal constitutional guarantees of due process, equal protection or right to contract.

In sum, the petition points to no constitutional, contractual or statutory provisions which would have rendered unlawful a decision by Western to terminate petitioner. Under the applicable case law, Western was entitled to terminate petitioner as it saw fit. Petitioner's claim that his separation from Western was somehow actionable is, therefore, as the courts below found, unsupported as a matter of law.

III.

The court of appeals properly affirmed the district court's denial of leave to amend this complaint.

The legal principles which govern the decision here have been well established by this Court and the federal courts generally for many years. In general, the grant or denial of a motion for leave to amend, pursuant to Fed. R. Civ. P. 15(a), is within the sound discretion of the district court; it will be reversed only for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Cornell & Co., Inc. v. Occupational Safety and Health Review Commission*, 573 F. 2d 820, 823 (3d Cir. 1978).

Rule 15(a) directs that leave to amend "shall be freely given", however, it is limited to situations "when justice so requires." Thus, it is well established that undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of amendment are grounds for denying leave to amend. *Foman v. Davis, supra,* 371 U.S. at 182; *Albee Homes, Inc. v. Lutman,* 406 F. 2d 11, 13-14 (3d Cir. 1969); *Cornell v. Occupational Review Commission, supra,* 573 F. 2d at 823; 3 *Moore's Federal Practice,* ¶15.08[4].

In *Boyd V,* despite petitioner's repeated failure to cure deficiencies in his complaint by prior amendments, the district judge granted petitioner a third opportunity to amend his complaint as to fraud in conformance with Fed. R. Civ. P. 9(b) (PA24, 27-28). However, the third amended complaint eventually submitted by petitioner did not comply with the conditional leave to amend granted by the district judge (PA26-28).[14] The third amended complaint, which was to deal only with the allegations of fraud, contained three completely new counts and, in the count relating to fraud, nineteen new "items" never previously raised (PA26, 31). Because the amended complaint did not comply with its previous order, the district court viewed petitioner's application as a new motion for leave to file an amended complaint (PA27-28).

The district court found that petitioner's third amended complaint had not been submitted until eight months after the

14. Such a conditional grant of leave to amend was proper. As stated in 6 Wright & Miller, *Federal Practice and Procedure,* §1486 at p. 424 (1974): "The statement in Rule 15(a) that 'leave shall be freely given when justice so requires' presupposes that the court may use its discretion to impose conditions on the allowance of a proposed amendment as an appropriate means of balancing the interests of the parties seeking the amendment and those of the party objecting to it." *See also,* 3 *Moore's Federal Practice,* ¶15.08[6] ("It is within the court's discretion to allow an amendment on terms").

previous complaint had been dismissed and after the scheduled pretrial conference (PA25; RA5-6). At that point over two years had elapsed since the suit was commenced; over five years had passed since the events underlying the complaint had occurred (PA28). Under these circumstances, the district court's findings of undue delay and prejudice to respondents were proper and fully justified the denial of leave to amend.[15] *Albee Homes, Inc. v. Lutman, supra,* 406 F. 2d at 13-14; *Nevels v. Ford Motor Co.,* 439 F. 2d 251, 257 (5th Cir. 1971).

Petitioner argues (Petition, p. 44) that the third amended complaint was actually the first amended complaint and was, therefore, to be permitted as of right under Rule 15(a). Petitioner's argument ignores that he was twice permitted to amend his complaint. In both instances those amended complaints were dismissed by the court.[16] Thus, petitioner was permitted to amend his complaint not once, but twice, and was given a third opportunity which he forfeited through his own delay and bad faith.[17]

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15. As noted by the district judge, while petitioner proceeded *pro se,* he is not an unintelligent man, had been assisted by judges of the federal and state courts and was a student at a New Jersey law school (RA5).

16. The dismissal of those first two amended complaints is not an issue before the Court.

17. In the alternative, the district judge found, after reviewing each of the allegations of fraud, that the elements of fraud were not pleaded with specificity as required by Fed. R. Civ. P. 9(b) (PA30-40). *See Ross & Ross v. A.H. Robins Co., Inc.,* 607 F. 2d 545 (2d Cir.), *cert. denied,* 446 U.S. 946 (1979); *Cramer v. General Telephone & Electronics Corporation,* 582 F. 2d 259, 272 (3d Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979).

IV.

The court of appeals properly upheld the district court's grant of summary judgment on petitioner's ADEA claim.

Petitioner in his initial complaint in *Boyd V* alleged that respondents violated the ADEA in terminating his employment. The district court, noting that the identical claim had been dismissed with prejudice in *Boyd I*, held that petitioner was barred from again raising this claim under principles of *res judicata*.

Petitioner does not now argue that his claim was improperly barred. Rather, he asserts that the initial decision to dismiss his claim in *Boyd I* was incorrect (Petition, pp. 26-31). That earlier decision, which was affirmed by the United States Court of Appeals for the Third Circuit in 1977 [*Boyd v. Western Electric Co., Inc.*, 562 F. 2d 41 (3d Cir. 1977)] and which petitioner unsuccessfully attempted to appeal to this Court, should not be disturbed.

As recently explained by this Court in *Federated Department Stores, Inc. v. Moitie and Brown*, 49 U.S.L.W. 4687, 4689 (June 15, 1981):

> "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877). Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Angel v. Bullington*, 330 U.S. 183,

187 (1947); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887). As this court explained in *Baltimore Steamship Company v. Phillips*, 274 U.S. 316, 325 (1927), an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata* . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action.' We have observed that 'the indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Reed v. Allen*, 386 U.S. 191, 201 (1932).

The facts in this case warranted application of the doctrine of *res judicata*. The parties or their privies took part in *Boyd I* and *V* and the identical claim was presented in both cases. Under these circumstances the lower courts properly held that petitioner's ADEA claim was barred.[18]

---

18. A brief review of petitioner's argument indicates that the prior dismissal of the ADEA claim in *Boyd I* was proper. Petitioner relies on *Holliday v. Ketchum, McLeod and Grove, Inc.*, 584 F. 2d 1221 (3d Cir. 1978). However, as the Third Circuit recognized, prior to its decision in the instant matter, *Holliday* was overruled *sub silentio* in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). *See Marshall v. Chamberlain Manufacturing Corp.*, 601 F. 2d 100, 100-101 (3d Cir. 1979). The decision in *Boyd I* to dismiss the ADEA claim because of petitioner's failure to notify the Department of Labor of his intent to sue and because of his failure to provide the state agency with notice of his discrimination claim 60 days prior to instituting suit is not inconsistent with *Oscar Mayer*.

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SEBASTIAN J. FORTUNATO
Counsel for Respondents
PITNEY, HARDIN, KIPP
& SZUCH

Of Counsel:

BYRNE F. MARTIN,
WESTERN ELECTRIC COMPANY,
INCORPORATED

APPENDIX

EXCERPTS OF UNITED STATES DISTRICT COURT HEARING DATED MARCH 27, 1981

UNITED STATES DISTRICT COURT

JOHN E. BOYD,

Plaintiff,

v.

WESTERN ELECTRIC, et al.,

Defendant.

BEFORE: The Honorable FREDERICK B. LACEY, U.S.D.J.

Appearances:

JOHN E. BOYD,
Pro Se.

PITNEY, HARDIN & KIPP
BY: EDWARD P. LYNCH, ESQ.
and MYLES C. MORRISON, III, Esq.
For the Defendants.

MOTION

TRANSCRIPT OF PROCEEDINGS
March 27, 1978

[Commencing at page 17]

Excerpts of United States District Court Hearing Dated March 27, 1981

* * *

"MR. LYNCH: Your Honor, we have moved for dismissal or summary judgment in both cases before you. The first point I think perhaps to be taken up involves number 2470 which is a 9-count complaint. Count 3 of that complaint pleads a violation of the Age Discrimination Act —

THE COURT: Wait a minute. Count 3?

MR. LYNCH: Count 3, yes.

THE COURT: All right. I have it.

MR. LYNCH: That matter, your Honor, I think is barred by the doctrine of res judicata. That was dismissed in the prior district court action and that was affirmed by the Third Circuit. So I think res judicata is a bar to Count 3 of this case.

Count 4 pleads what is arguably —

THE COURT: Wait just a minute. Let me get Judge Meanor's opinion out.

Where did he deal with that? At what point?

MR. LYNCH: I think the bulk of his opinion dealt with that question, your Honor.

Beginning at page 4, I think.

Excerpts of United States District Court Hearing Dated March 27, 1981

THE COURT: All right. What about that fact that Mr. Lynch has pointed out, how do you handle that, Mr. Boyd?

MR. BOYD: Well, that's one of the points being appealed in this Supreme Court case. I feel that the 180-day requirement was not meant to be jurisdictional by Congress when they passed the ADEA and —

THE COURT: All right. I'm going to grant the motion as to Count 3 on res judicata grounds."

* * *

EXCERPTS OF UNITED STATES DISTRICT COURT MEMORANDUM OPINION DATED FEBRUARY 14, 1979

UNITED STATES DISTRICT COURT

JOHN E. BOYD,

Plaintiff,

vs.

WESTERN ELECTRIC, a corporation and THEODORE G. CLARK,

Defendants.

BEFORE: The Honorable FREDERICK B. LACEY, U.S.D.J.

Appearances:

JOHN E. BOYD,
Pro Se.

MESSRS. PITNEY, HARDIN & KIPP
BY: EDWARD P. LYNCH, ESQ.
and MYLES C. MORRISON, III, ESQ.
For the Defendants.

MEMORANDUM OPINION
February 14, 1979

[Commencing at page 4]

Excerpts of United States District Court Memorandum Opinion Dated February 14, 1979

"THE COURT:

* * *

In the first place, it is clear to me that the plaintiff has failed to proceed in good faith in that he has waited until after the pretrial conference was held in these cases to file his amended complaint. To deal with it, if we were to deal with it at all on its merits, further discovery would have to take place with a resultant delay in the trial and another pretrial conference would have to be held and the matter reset on the trial calendar.

While the plaintiff is a pro se litigant, he is not an unintelligent man, as the record will reflect. He had been in this court in several other actions as well as an active litigant in the State Court. He has had the assistance of not only this court but of other judges in this court and in the State Court to the extent that he has been given assistance and direction in pursuing his litigation.

Additionally, as has been noted, he is also a student at one of the New Jersey law schools.

He could hardly expect to be permitted to file an amended complaint some eight months after being given permission to do so when, as I have noted, that filing comes after the date of the pretrial conference.

Excerpts of United States District Court Memorandum Opinion
Dated February 14, 1979

* * *

As I have noted, in December counsel were notified and pro se plaintiff was notified of pretrial and trial dates."

(30)

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 80-2186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN E. BOYD,

Petitioner,

v.

WESTERN ELECTRIC, a corporation, JOHN D. DEBUTTS and THEODORE G. CLARK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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As to form:

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September, 1981

TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Citations.....	ii
Jurisdiction.....	3
Constitutional and Statutory Provisions and Rules.....	3
Constitutional Provisions.....	3
Statutes and Rules.....	4
Statement of the Case.....	4
Counter-Argument:	6
Counter-Argument: Part 1:.....	6
I. Rebuttal of Respondents' Arguments set forth under Respondents' "Statement of the Case"..	6
Counter-Argument: Part 2:	9
I. Rebuttal of Respondents' Argument I: The Petition was filed within the 90 days required by 28 U.S.C. §2101(c).....	9
II. Rebuttal of Respondents' Argument II: The trial court and court of appeals depart-	

CONTENTS

Page

ed from "Well established principles" in Granting Sum-. mary judgment..... 12

III. Rebuttal of Respondents' Argment III: Petitioner had a Statutory Right to Amend..... 17

IV. Rebuttal of Respondents' Argument IV: Petitioner's Age Discrimination Claim under the ADEA Should be Reinstated.... 18

Summary..... 19

Conclusion..... 20

TABLE OF CITATIONS

Cases Cited:

Goger v. H. K. Porter Co., Inc., 492 F.2d 13 (3d Cir. 1974)..... 18,19

Goodman V. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976)..... 12

Holiday v. Ketchum, McLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) 18

CONTENTS

Page

Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978). 2,9,16

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 18

Rogers v. Exxon Research & Engineering Co., 434 U.S. 1022 (1978). 19

Schacht v. United States, 398 U.S. 58 (1970)..... 11

Statutes Cited:

Age Discrimination in Employment Act, P.L. 90-202, 81 Stat. 602(ADEA): 29 U.S.C.§621 et seq. 18,19

Judicial Code and Judiciary Act, c. 646, 62 Stat. 869: 28 U.S.C. §2101(c)..... 9

Rules Cited:

Federal Rules of Civil Procedure:

Rule 15(a)..... 17

Rule 56(b) 12

United States Supreme Court Rules:

Rule 33.7 4,11

NO. 80-2186

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN E. BOYD,
Petitioner,

v.

WESTERN ELECTRIC, a corporation, JOHN D. DEBUTTS and THEODORE G. CLARK,
Defendants.

REPLY BRIEF FOR PETITIONER

First, the most important aspect of respondents' brief is what it left unsaid because respondent omits all reference to the following:

1. The tortious interference by Western Electric (Hereinafter, "Western") with the offer of a position by the American Telephone and Telegraph Co.(Hereinafter, "A. T. & T. Co.") in November, 1973.

2. The fact that the co-engineer of petitioner at Kearny Works of Western, who

was dismissed by Western in November, 1971 and who sued Western for tortious interference with her employment contract and other counts, in the same district court as petitioner, was reinstated in a judgment by Judge Stern, with back and increased pay and damages, for her state claims (as distinct from her sex bias demands). Judge Stern ruled that she had suffered, "(t)ortious interference with her employment contract with Western" Kyriazi v. Western Electric Co., 461 F. 894 (D.N.J. 1978) at 950 (PA52)[1]

3. Respondents continue to misread the facts to suggest that petitioner was dismissed, whereas actually he retired under a pension contract (Special Early Retirement Contract: hereinafter "SERP" contract), signed under duress.

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1. "PA" refers to petitioner's appendix; "PB" to petitioner's brief; "RA" to respondents' appendix and "RB" to respondents' brief.

4. Respondents fail to mention that if the petitioner had been dismissed, in fact, he would be in the same category as fellow-engineer, Kyriazi, who was reinstated by Judge Stern, as noted above.

OPINIONS BELOW

Petitioner respectfully submits that the Opinions below are adequately identified in the petition (PA1-51).

JURISDICTION

Petitioner respectfully submits that facts relating to this Court's jurisdiction are adequately set forth in the petition; and petitioner submits that the petition was filed in timely fashion; because the petition was filed on March 4, 1981, which is 56 days from the date of filing of the judgment being appealed from in the court of appeals on Jan. 7, 1981.

CONSTITUTIONAL PROVISIONS

Petitioner respectfully submits that

constitutional provisions are adequately set forth in the petition (PB3).

STATUTES AND RULES

Petitioner submits that statutes and rules are set forth in petition and respondents' brief except for United States Supreme Court Rule 33.7 which is as follows:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument."

STATEMENT OF THE CASE

Petitioner submits that the Statement of the Case is set forth correctly in petition. However respondents omit important facts in their Statement of the Case (RB4-8) as follows: (1) They fail to relate that Western's supervisors applied duress to petitioner previously to signing the SERP

early retirement contract on Aug. 10, 1973. (2) Respondents neglect to record the important fact that petitioner was offered a position as mentioned on page 1, by A.T.&T. Co. in N.YC. on a transfer basis but Western refused to allow petitioner to accept.

In addition, respondents improperly contain much argument in their Statement of the Case. For example, respondents err where they say, "The district judge found there was no question but that petitioner was, in effect, discharged from his employment with Western." (RB6, para. 2). What Judge Lacey did say was, "(i)t is the law of New Jersey...that the issue is whether the defendants had the right to terminate him at any time or for any reason." (PA37, 38). Obviously the court's statement is erroneous because there is no law as to issues. The above will be discussed in more detail under "Argument".

The fact or gravamen is that petitioner

was not discharged but retired on pension and respondents have created this phantom issue because they can not answer the real issues.

In respondents' brief they include several critical arguments under their "Statement of the Case". The petitioner will properly address the aforementioned arguments under the "Argument" heading of this reply brief.

Petitioner now submits this reply brief in answer to respondents' "Brief in opposition to the petition for certiorari".

COUNTER-ARGUMENT: PART I

REBUTTAL OF RESPONDENTS' ARGUMENTS SET FORTH UNDER RESPONDENTS' "STATEMENT OF THE CASE"

There are several issues vital to petitioner's case, which respondents incorrectly argued under their "Statement of the Case".

For example, respondents attempt to

explain away petitioner's allegation of "duress" relating to the signing of the SERP Early Retirement Contract. Respondents quote Judge Lacey as follows: "(T)he 'duress' evaporates when it is understood that because his employment was at will his employer had the right to terminate him at any time." (RB6). Here, the district court erred because "duress" is a state of mind, and when an employer threatens an employee of 26 year's service at short notice with intimations of dismissal, there is duress applied.

Respondents present other errors in their "Statement of the Facts". For example respondents quote the district court as follows: "The district judge also found that petitioner had failed to present facts in rebuttal to respondents' summary judgment motion so as to raise 'a genuine issue of material fact.'" (RB6). But petit-

ioner contends that Judge Lacey's Memorandum (PA39) contained errors and he refused to engage in fact-finding. For example, he says, "(d)uring the plaintiff's tenure with Western Electric he was not a member of a collective bargaining unit...." (PA-38). This statement is incorrect. Judge Lacey himself had dismissed Count 4 of petitioner's complaint in docket 76-2470 (79-1754 on appeal), which alleged discrimination fcr petitioner's "(m)embership or previous membership in Professional Engineers' Union CWEPE or more recently UFE...."

Another example of an issue on which there is a question of fact, is where petitioner told Judge Lacey he had an implied contract of employment with Western and Judge Lacey ruled no contract existed (Transcript dated May 24, 1978, p.39). In contrast Judge Stern ruled that Kyriazi, a co-worker under a similar set of facts as petitioner, had a contract of employ-

ment. Kyriazi v. Western Electric Co., 461 F. Supp. at 950 (D.N.J. 1978).

Other examples of questions of fact were discussed adequately in the petition.

COUNTER-ARGUMENT: PART 2

I. REBUTTAL OF RESPONDENTS' ARGUMENT I

THE PETITION WAS FILED WITHIN THE 90 DAYS REQUIRED BY 28 U.S.C. §2101(c)

The respondent errs in claiming petitioner did not file his petition on time because as explained on p.3, petitioner filed on Mar. 4, 1981 which was 56 days from the Jan. 7, 1981 date of judgment of the court of appeals and this fulfills 28 U.S.C. §2101(c) which allows 90 days.

The Clerk of the Court stamped the date and told petitioner to make changes to the form to conform to June 30, 1980 Changes in United States Supreme Court Rules; e.g. the Questions had to be moved to the front and other rather extensive changes in form were required since the petition was a consolidation of several cases from below. Petit-

ioner engaged attorneys, one of whose names appears on the petition. Mr. Edward C. Schade, assistant clerk telephoned petitioner to accelerate re-submission and petitioner completed the required changes.

On June 14, 1981 petitioner telephoned Mr. Schade advising him that the petition was completed and being printed. Mr. Schade urged immediate filing. Petitioner filed 40 copies on June 25, 1981, mailing three copies to respondents from Newark, N.J. with a covering letter at 1 p.m. on June 25, 1981 at Pennsylvania Station.

Respondents showed inexcusable neglect by failing to realize they had received a petition and sleeping on the case. Petitioner telephoned respondents' attorney on July 20, 1981 and found Mr. Lynch, respondents' attorney, was on vacation and they did not realize they had a petition. Im-

mediately another attorney, Mr. S. Fortunato asked for and received from the clerk of the Supreme Court of the United States, an extension of time to Aug. 14, 1981, to file their "brief in opposition to the petition". Respondents filed brief Aug.14/81.

Respondents' citation in Schacht v. United States, 398 U.S. 58, 68-69 (1970) quotes Justice Harlan as follows: "'(i)t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules for the orderly transaction of business...when in a given case the ends of justice require it." This quotation from Justice Harlan is applicable to petitioner who was allowed to refile petition under Rule 33.7 (Reply brief, p.4).

It is clear the respondents' arguments are not even reasonable and the Court was merely applying the usual rules in allowing petitioner to make corrections in form and refile; whereas in contrast respondents'

application for extension was supported by false information regarding date of receipt of copies of the petition from petitioner.

REBUTTAL OF RESPONDENTS' ARGUMENT II

THE TRIAL COURT AND THE COURT OF APPEALS DEPARTED FROM "WELL ESTABLISHED PRINCIPLES" IN GRANTING SUMMARY JUDGMENT

The district court departed from the proper application of Rule 56(b) of Fed. R. Civ. P. (RB3) and erred in applying a legal precept because: (1) it did not view inferences "(i)n the light most favorable to the party opposing the motion. The nonmovant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566 at 573 (3d Cir. 1976). (2) The district court did not consider the vital issues, because of the court's annoyance at petitioner's difficulty in getting competent counsel. (3), The district court

focussed on the wrong issue, supplied by the respondents, i.e. the court considered only the phantom issue of "termination" meaning "dismissal" whereas the petitioner was not terminated but retired on a pension under a pension contract.

The petitioner is challenging the issue, "the legality of a retirement contract signed under duress". The difficulties which would have been faced by respondent Western, if it had in fact, "terminated" or "dismissed" petitioner with 26 year's service, were formidable and were in fact, illustrated in the case of fellow-employee, Kyriazi (PA52).

Another important issue not considered by the district court, was the "interference with petitioner's position of advantage with respect to the offer of a job by the A. T. & T. Co., which Western refused to allow petitioner to accept." (PB35-37). Thus, the district court not only did not

consider the issue favorably to the non-movant but failed or refused to consider this issue which is vital to this suit.

Petitioner stresses that Judge Lacey's ruling refusing to reinstate petitioner is at variance with Judge Stern's ruling in the same court, reinstating Kyriazi who had shorter employment than petitioner.

Moreover, respondents' statement that, petitioner had failed to show facts limiting Western's right to terminate petitioner (RB 12, para. 1) is incorrect. Petitioner showed he was similar to Kyriazi who was ruled to have a contract of employment and to have suffered tortious interference (PB32-35; PA52).

In note 11 (RB11), respondents err in interpreting the notation on the SERP contract (PA52) which said, "(t)his form has been signed under deliberate pressure from Mr. Newill and Mr. Cuthbertson to sign or be terminated" as proving petitioner was

dismissed. The facts are that at the signing of the SERP contract on Aug.9 and 10, 1973, the respondents suggested possible dismissal in order to force petitioner to sign. If petitioner had not signed and if he had been subsequently terminated or dismissed, he would have been in the same position as Kyriazi who was reinstated by Judge Stern.

On p. 12 (RB12) respondent errs in para. 2 by stating petitioner has failed to establish the critical prerequisites to a claim of tortious interference. In the first place respondents ignore the offer of a position by A. T. & T. Co. in Nov., 1973, which Western refused to permit petitioner to accept. Here, Western is a third party who maliciously interfered with petitioner's position of advantage with respect to the A. T. & T. Co. position.

Similarly, respondents in note 13 (RB 13) again incorrectly attempt to disparage Judge Stern's use of the phrase,

"tortious interference with her employment contract" (PA52) as a slip of the pen. Respondents simply have misread and misunderstood Judge Stern. Moreover, Judge Stern ruled Kyriazi was under the six year statute of limitations for contracts (See Kyriazi v. Western Electric Co., 461 F. Supp. at 902 (D.N.J. 1978).

Moreover in the same note 13 (RB13) respondents contradict themselves by alleging a contract is necessary for the petitioner but when Judge Stern rules that Kyriazi has a contract; then, respondents say a contract is not necessary (Note 13, last sentence).

Petitioner errs in arguing public interest was not in the complaint (RB13).

The issue pleaded by respondents is that petitioner can not make a contract with his employer or sue to set aside a contract(The SERP contract), because he is an employee. This contention violates the

common law of contracts and petitioner's constitutional rights to form a contract (PB16-23).

In conclusion, the trial court improperly granted summary judgment.

REBUTTAL OF RESPONDENTS' ARGUMENT III

THE PETITIONER HAD A STATUTORY RIGHT TO AMEND

The distinguishing feature of this issue, is what respondents failed to mention, namely: their failure to file an answer to the complaint in docket 76-2470 (79-1754 on appeal) due to an oversight. Judge Lacey asked respondents at the March 28, 1978 hearing if they had filed an answer and respondents mistakenly told the court that they had (Transcript p. 25). Since there was no answer, petitioner had a right to amend without permission or by motion (Fed. R. Civ. P. 15(a); PB5).

The district court subsequently instructed petitioner to include more recent

specific examples of fraud. Petitioner complied with Judge Lacey's order; but when he submitted the amended complaint, Judge Lacey told him he was not in compliance with the court because the more recent examples constituted new matters (PA31), even though the primary issue of fraud was untouched. Thus, in effect Judge Lacey dismissed petitioner's proposed amended complaint for complying with his order.

REBUTTAL OF RESPONDENTS' ARGUMENT IV

PETITIONER'S AGE DISCRIMINATION CLAIM UNDER THE ADEA SHOULD BE REINSTATED

In note 18 (RB18) respondents repeat their erroneous statement that Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) overrules Holiday v. Ketchum, McLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978), which overruled Goger v. Porter Co., Inc., 492 F.2d 13 (3d Cir. 1974) (PB26-30); i.e. petitioner does not lose his ADEA rights by filing his notice of intent to sue with N. J. Dept. of Civil Rights beyond the 180

days from cause of action.

Also petitioner should receive "equitable relief" from the effects of Goger, id., as held in the case of Roger v. Exxon Research & Engineering Co., 434 U.S. 1022 (1978). It is relevant that petitioner has been in court over six years on this ADEA claim against Western.

SUMMARY

RESPONDENTS' BRIEF IN OPPOSITION BRINGS NOTHING NEW TO THIS CASE. THEY AVOID THE REAL ISSUES, SUCH AS: TORTIOUS INTERFERENCE BY WESTERN INTO PETITIONER'S JOB OFFER FROM A. T. & T. CO. THEY FAIL TO BRING PROPER FOCUS TO THE SUCCESSFUL CASE OF PETITIONER'S CO-WORKER, KYRIAZI. KYRIAZI'S REINSTATEMENT IN THE SAME DISTRICT COURT, REFLECTS CONFLICTING RULINGS, BETWEEN JUDGE STERN AND JUDGE LACEY, IN RESPECT TO KYRIAZI'S STATE CLAIMS. RESPONDENT'S BRIEF DOES NOT ANSWER THE ARGUMENTS SET FORTH IN THE PETITION AND FAILS TO ARTICULATE THE BASIC ISSUES.

CONCLUSION

For above reasons, it is respectfully prayed that a writ of certiorari be issued to review the judgment of the United States Court of Appeals in these cases.

This case is important for those employees, who are caught up in the mechanics of management in large monopolies and technicalities in the laws. The will of Congress is that such employees be employed and not suffer from age discrimination. Respondents have attacked petitioner's pro se status, but as stated in petition, if certiorari is granted, Professor Louis Raveson, Esq. of Rutgers University Law School's Urban Legal Clinic is willing to represent petitioner before the Supreme Court of the United States.

Respectfully submitted

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Sept., 1981

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply Brief for Petitioner, were mailed or delivered to Edward P. Lynch, Pitney, Hardin & Kipp, Attorneys for the respondents, at 163 Madison Ave., Morristown, N.J. 07960, on the 10th day of September, 1981

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